

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1967

---

No. 309

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED  
STATES AND CANADA, ET AL., *Petitioners*,

v.

JOSEPH CARROLL, ET AL., *Respondents*.

---

No. 310

JOSEPH CARROLL, ET AL., *Petitioners*,

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED  
STATES AND CANADA, ET AL., *Respondents*.

---

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

---

INDEX TO APPENDIX

	Page
Relevant Docket Entries .....	1
Complaint in 60 Civil 2939 .....	3
Answer in 60 Civil 2939 .....	21
Complaint in 60 Civil 4926 .....	30
Answer of Local 802 in 60 Civil 4926 .....	43



	Page
Answer of Federation in 60 Civil 4926 .....	51
Plaintiffs' Requests for Admissions .....	59
Defendants' Answers to Request for Admissions .....	70
Plaintiffs' Exhibit 388 .....	77
Excerpts from Deposition of Alfred J. Manuti .....	93
Pre-Trial Order .....	100
District Court Findings of Fact and Opinion .....	124
District Court Judgment .....	178
Notice of Appeal .....	179
Court of Appeals Opinion .....	180
Opinion of Circuit Judge Friendly .....	203
Court of Appeals Judgment .....	207
Orders Extending Time to File Petitions for Writs of Certiorari .....	208, 209
Order Allowing Certiorari .....	210

## APPENDIX

### Relevant Docket Entries

#### UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civil 2939

JOSEPH CARROLL, CHARLES PETERSON and CHARLES TURECAMO,  
as Treasurer, ORCHESTRA LEADERS OF GREATER NEW  
YORK,

*Plaintiffs,*

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES  
AND CANADA, HERMAN D. KENIN, as President of said  
FEDERATION, STANLEY BALLARD, as Secretary of said  
FEDERATION, and GEORGE V. CLANCY, as Treasurer of  
said FEDERATION, ASSOCIATED MUSICIANS OF GREATER  
NEW YORK, LOCAL 802, and AL MANUTI, as President of  
LOCAL 802, MAX L. ARONS, as Secretary of LOCAL 802,  
and HI JAFFE, as Treasurer of LOCAL 802,

*Defendants.*

60 Civil 4926

[Same caption as in 60 Civil 2939]

July 27, 1960—60 Civil 2939, filed complaint and issued  
summons.

November 10, 1960—60 Civil 2939, filed answer of de-  
fendants.

December 15, 1960—60 Civil 4926, filed complaint and issued  
summons.

February 21, 1961—60 Civil 4926, filed answer of defendant Associated Musicians of Greater New York to the complaint.

May 12, 1961—60 Civil 4926, filed answer of defendant American Federation of Musicians to the complaint.

May 22, 1961—60 Civil 2939 and 60 Civil 4926 consolidated by order of Ryan, J.

June 12, 1963—Filed plaintiffs' proposed agreed statement of facts.

September 18, 1963—Filed defendant Local 802's answer to request for admissions.

August 14, 1964—Filed pre-trial order of Levet, J. Consented to.

May 18, 1965—Filed findings of fact and opinion of Levet, J.

May 25, 1965—Filed judgment of Levet, J., dismissing actions on their merits.

June 2, 1965—Filed plaintiffs' notice of appeal.

January 30, 1967—Filed opinion and judgment of Court of Appeals.

October 16, 1967—Filed certified copy of order of Supreme Court granting certiorari.

---

**Complaint in 60 Civil 2939**

(Tr. pp. 1577-2123)

**UNITED STATES DISTRICT COURT****FOR THE SOUTHERN DISTRICT OF NEW YORK**

**JOSEPH CARROLL, CHARLES PETERSON and CHARLES TURECAMO,**  
**as Treasurer, ORCHESTRA LEADERS OF GREATER NEW**  
**YORK,**

*Plaintiffs,*

v.

**AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES**  
**AND CANADA, HERMAN D. KENIN, as President of said**  
**FEDERATION, STANLEY BALLARD, as Secretary of said**  
**FEDERATION, and GEORGE V. CLANCY, as Treasurer of**  
**said FEDERATION, ASSOCIATED MUSICIANS OF GREATER**  
**NEW YORK, LOCAL 802, and AL MANUTI, as President of**  
**LOCAL 802, MAX L. ARONS, as Secretary of LOCAL 802,**  
**and HI JAFFE, as Treasurer of LOCAL 802,**

*Defendants.*

Plaintiffs, by SCHMIDT & McDONALD, their attorneys, for their complaint, allege:

1. This action arises under the laws of the United States, specifically the Sherman and Clayton Anti-Trust Acts (15 U. S. Code, sections 1, 2, 15 and 26); and under the laws of the State of New York, specifically, section 340 of the General Business Law of the State of New York; and under the common law of the State of New York.

2. Plaintiffs, JOSEPH CARROLL and CHARLES PETERSON are orchestra leaders and are, also, members in good standing of LOCAL 802 ASSOCIATED MUSICIANS OF GREATER NEW YORK (hereinafter referred to as LOCAL 802 and of defendant, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED

STATES AND CANADA). Their business addresses are respectively: 174 East 74th Street, New York 21, N.Y., and 110 West 34th Street, New York 1, N. Y.

3. Plaintiff, ORCHESTRA LEADERS OF GREATER NEW YORK, is an unincorporated association within the meaning of the General Associations Law of the State of New York. Its membership comprises of more than ten orchestra leaders, all of whom are members of defendant unions and some of whom belong to other Locals affiliated with the AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA. Its office is located at 174 East 74th Street, New York, N. Y.

4. Plaintiffs, CHARLES TURECAMO and JOSEPH CARROLL, are the Treasurer and the Secretary, respectively, of ORCHESTRA LEADERS OF GREATER NEW YORK.

5. DEFENDANT, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, (hereinafter called INTERNATIONAL ORGANIZATION) is (with the qualification alleged below) a labor union or labor organization within the meaning of Section 3, subdivision i, of the Labor-Management Reporting and Disclosure Act of 1959. It is affiliated with the AFL-CIO and its principal office is located at 425 Park Avenue, New York 22, N. Y. It is an international union, comprising numerous local unions, one of which is defendant LOCAL 802.

6. Defendant, LOCAL 802, is (with the qualification alleged below) a labor organization within the meaning of Section 3, subdivision i, of the Labor-Management Reporting and Disclosure Act of 1959; it is affiliated with (a) the AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, as one of its locals and (b) the AFL-CIO. Its principal office is located at 26 West 52nd Street, New York 19, N. Y.

7. The various locals affiliated with defendant, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, have their principal offices in various States of the



United States and in Canada, and their membership exceeds a total of 260,000 orchestra leaders and sidemen in practically every State of the United States, in Canada, in Puerto Rico, and in the Virgin Isles.

8. Defendant, HERMAN D. KENIN is, and for some time past has been, president of the INTERNATIONAL ORGANIZATION.

9. Defendant, STANLEY BALLARD is, and for some time past has been, SECRETARY OF THE INTERNATIONAL ORGANIZATION.

10. Defendant, GEORGE V. CLANCY is, and for some time past has been TREASURER OF THE INTERNATIONAL ORGANIZATION.

11. Defendant, AL MANUTI is, and for some time past has been, President of LOCAL 802.

12. Defendant, MAX L. ARONS is, and for some time past has been, Secretary of LOCAL 802.

13. Defendant, HI JAFFE, is and for some time past has been, Treasurer of LOCAL 802.

14. Annexed hereto, marked "*Exhibit A*", to form part of this complaint is a copy of the CONSTITUTION, BY-LAWS AND POLICY of the defendant, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA. Though dated "1959", it is the current Constitution and By-laws of that INTERNATIONAL ORGANIZATION.

15. Annexed hereto, marked "*Exhibit B*", to form part of this complaint is a copy of the current CONSTITUTION AND BY-LAWS of defendant, LOCAL 802, revised as of October 5, 1959.

16. Annexed hereto, marked "*Exhibit C*", to form part of this complaint is a copy of the official "PRICE LIST GOVERNING SINGLE AND STEADY ENGAGEMENTS" of defendant, LOCAL 802, revised as of June 1, 1959.

17. Annexed hereto, marked "*Exhibit D*", to form part of this complaint is a copy of the official "SINGLE ENGAGEMENT MINIMUMS" of defendant, LOCAL 802, revised as of June 1, 1959.

18. Annexed hereto, marked "*Exhibit E*", to form part of this complaint is a copy of the official "WAGE SCALES, RULES AND REGULATIONS GOVERNING STEAMSHIPS" published by defendant, LOCAL 802.

19. Annexed hereto, marked "*Exhibit F*", to form part of this complaint is a copy of the official "BY-LAWS AFFECTING TRAVELING MEMBERS IN EFFECT SEPTEMBER 15, 1954", published by defendant, INTERNATIONAL ORGANIZATION.

20. Annexed hereto, marked "*Exhibit G*", to form part of this complaint is a copy of a notice appearing in ALLEGRO (issue of June, 1960) by which defendants established "New Minimums" supplementing or revising "*Exhibit D*", *supra*.

21. LOCAL 802, regularly publishes an official, printed magazine entitled "ALLEGRO", which is issued monthly.

22. Annexed hereto, marked "*Exhibit A*", to form part of this complaint are some pages of the issue of ALLEGRO dated May, 1960. These pages reprint, in full, an announcement of a change (by way of increase of rates) of the PRICE LIST GOVERNING SINGLE AND STEADY ENGAGEMENTS ("*Exhibit C*").

23. Plaintiffs bring this action for themselves and for all members (so numerous as to make it impractical to bring them all before the Court) of LOCAL 802 and of the INTERNATIONAL ORGANIZATION who are similarly situated; and this complaint raises common rights; and a common relief is sought herein; and the object of this action is the adjudication of claims which do or may seriously affect the specific property rights of plaintiffs and of said class; and this class action is authorized by Rule 23 of the Federal Rules of Civil Procedure.



24. Plaintiffs and the class they represent, are: (a) employers who regularly employ sidemen or employee musicians who are members of the INTERNATIONAL ORGANIZATION, OF LOCAL 802 and of other locals affiliated with the INTERNATIONAL ORGANIZATION; and (b) independent contractors who are largely engaged in the single engagement field; i.e., they are hired *ad hoc* by clients to furnish musical services for weddings, banquets, dances and other occasions which are not steady engagements. The distinction between single engagements and steady engagements is set forth in the CONSTITUTION AND BY-LAWS OF LOCAL 802 ("Exhibit B") and in the PRICE LIST GOVERNING SINGLE AND STEADY ENGAGEMENTS OF LOCAL 802 ("Exhibit C").

25. Defendant, LOCAL 802, has a membership of some thirty thousand (30,000) members, including plaintiffs and the class they represent.

26. Plaintiffs, and the class they represent as employers and independent contractors, frequently fulfill single engagements outside of the State in which they usually operate and in which their principal offices are located. Plaintiffs and the class they represent gross millions of dollars of income per year from such engagements in various states of the United States in connection with which they render musical services outside of the State in which they usually operate or in which their principal offices are located. Many of the purchasers of such musical services (the clients whom plaintiffs and the class they represent serve) are large companies engaged in interstate or foreign commerce. Many of the sidemen or musicians employed by plaintiffs and the class they represent derive, each year, hundreds of thousands of dollars from rendering their musical services in various states of the United States outside of the State in which they reside or in which they usually render such musical services.

27. Plaintiffs, as independent contractors and employers, operate their several businesses independently; have

their own usual and occasional clientele, employ their sidemen or musicians for each particular occasion, direct such musicians themselves or assign directors for them, control or discipline such employees, conduct all negotiations leading to engagements, regulate the style and manner of performance by their orchestras during such engagements and regularly and necessarily employ sidemen and musicians to assist them in carrying out their engagements which they cannot fulfill without such assistance. The named plaintiffs commonly provide such musical services regularly in New York, New Jersey, Connecticut and Pennsylvania as well as in other states.

28. Defendants, as a matter of long standing practice and policy, have insisted and do insist that orchestra leaders, especially those engaged in the single engagement field, shall become and remain members in good standing of the local unions affiliated with defendant, INTERNATIONAL ORGANIZATIONS.

29. Such insistence has been enforced from time to time by strikes, boycotts, picketing and other concerted action or by threat of such action; and the threat of such action affects the inter-state and intra-state business involvement of the plaintiffs and the class they represent and of their employees or sidemen.

30. One of the methods used by defendants to enforce their prices and minimums (as set forth in Exhibit C, D, E, F and G) is illustrated by the copy of a typical page taken from ALLEGRO (issue of June, 1960, page 28), hereto annexed marked "*Exhibit I*" to form part of this complaint. This notice typically calls for concerted action in visiting economic and other reprisals upon employers or members who fail to comply with the prices and minimums fixed by defendants. While such contract forms use highly artificial and dissembling language to misrepresent the true relationship between orchestra leaders and sidemen, they clearly reveal defendants' policy and practice of in-

sisting on prices and minimums established by defendants for employers and employees alike in the performance of musical services.

31. Defendant labor organizations are undoubtedly labor unions or labor organizations within the meaning of State and Federal laws governing labor relations when they purport to act on behalf of employees in collective bargaining; but when they purport to act on behalf of any combination, arrangement or conspiracy between certain employers and themselves, they do not act as labor unions or labor organizations; and it is impossible for said defendant unions simultaneously and without conflict of interest to represent plaintiffs and the class they represent (employer orchestra leaders) on the one hand and the employees of such orchestra leaders on the other hand.

32. Defendants insist upon the use of certain forms of contract wherever musicians are employed in the United States. Hereto annexed, marked "*Exhibits J and K*" respectively, are typical examples of such forms of contract required by defendants.

33. "*Exhibits A and B*" annexed to this complaint constituted contracts (or purported contracts where membership is not free but coerced) obligating plaintiffs and the class they represent as well as defendants and also all musicians at any time employed by plaintiffs and the class they represent. However, such contracts or purported contracts are in most cases not willingly assumed by employing orchestra leaders because many of them have been coerced into membership in defendant unions upon the basis of boycotts, strikes, picketing and other forms of concerted economic pressure or reprisal or upon the basis of threat of such pressure or reprisal.

34. Some orchestra leaders, including plaintiffs, have refused to comply with the impositions upon employers and employees made by defendants in the form of price lists and minimums and amendment thereof; while other orches-

tra leaders cooperate with defendants in fulfilling such price lists and minimums.

35. Defendants implement their monopoly of power by imposing at times upon the plaintiffs and the class they represent the equivalent of the obligations of a labor contract without ever indulging in collective bargaining; they also impose upon plaintiffs and the class they represent the aforesaid price lists and minimums without bargaining or agreement of any kind; they depend upon their monopoly position from which they control employee and employer musicians, for the purpose of inducing or coercing willing or unwilling, cooperation from orchestra leaders in applying the minimums and the prices aforesaid.

36. Defendants, in combination or cooperation with certain orchestra leaders, have arranged and are presently arranging or conspiring to fix prices for musical services in the United States by requiring plaintiffs and the class they represent to agree to the minimums and prices aforesaid.

37. The typical agreements exacted by defendants from all orchestra leaders as employers or independent contractors incorporate all of the restrictive practices and features herein complained of:

38. Defendants have in purpose or effect monopolized and are attempting to monopolize by the aforesaid arrangements and combination the marketing and sale of musical services throughout the United States and especially in the Greater New York area; and they have restrained, and have been and are engaged in a combination and conspiracy to restrain competition in the marketing of such musical services and to restrain trade and commerce among the several states all in violation of the Sherman Anti-Trust Act (15 U. S. Code Sections 1 and 2); and defendants' activities also constitute a violation of section 340 of the General Business Law of the State of New York.

39. The regulations aforesaid (especially the price list and minimums made and promulgated by defendants) con-

stitute a contract, combination or conspiracy in restraint of trade or commerce among the several states, because defendants collaborate with and exact compliance from a significant number of orchestra leaders who employ musicians and sidemen and who willingly comply with defendants' said regulations.

40. Defendants by said price list and minimum list and by their policy and practice as herein set forth restrict competition by unlawful restraints of trade and engage in unfair methods of competition.

41. The purpose or effect of defendants by their aforesaid policy and practice and by the said regulations is to eliminate or destroy competition or competitive business from the single and steady engagement field and to unduly and unreasonably restrict in that field the freedom of plaintiffs and those similarly situated to enter into normal business contracts or to fulfill them by access to the labor market.

42. The purpose or effect of defendants aforesaid policy and practice, as well as their price and minimum lists, is to impose restraints upon commerce within the State of New York which have a significant impact and influence upon commerce between the several states; and such appreciable local contractual and other restraints upon commerce exert in turn a substantial influence or effect upon commerce between the states.

43. The purpose or effect of defendants' aforesaid policy and practice, as well as of the aforesaid price and minimums lists, is solely to control prices in the single and steady engagement field.

44. The purpose or effect of defendants' aforesaid policy and practice and of said minimums and price lists is to foreclose access to a free market in musical services and to effectuate, within defendant unions and the circle of co-



operating orchestra leaders or employers a monopoly controlling, on a national basis, the market for musical services.

45. By their aforesaid price and minimums lists, defendants fix prices of all or most musical services coming within the stream of interstate commerce.

46. The purpose or effect of defendants by the aforesaid policy, practice and lists is to boycott all third parties or to visit upon them other economic reprisals unless they fall into line with defendants' aforesaid contract, combination, conspiracy or arrangement in restraint of trade.

47. The purpose or effect of the aforesaid policy, practice and lists of defendants is to cause an unnatural increase in the general level of prices for musical services within the area of interstate commerce and to exclude other competitors from the market for such musical services; and to effect bankruptcy or serious financial loss to orchestra leaders who, like plaintiffs and the class they represent, refuse to comply with the aforesaid policy, practice and lists of defendants.

48. Defendants have also formed a common law conspiracy to commit the above mentioned acts and torts against plaintiffs and the class they represent and in violation of law have conspired to interfere, and have in fact interfered, with reciprocal relationships between plaintiffs and the class they represent on the one hand and the clients who retain said plaintiffs and said class as independent contractors on the other hand.

49. Insofar as defendant labor organization do and have done are continuing to do the aforesaid things and commit the aforesaid acts and torts, they are not *bona fide* labor organizations within the meaning of state and federal labor relations laws and they cannot properly avail themselves of any statutory privileges and immunities enjoyed by genuine labor organizations.

50. Defendants by the arrangements or conspiracy aforesaid have entered into a plan and scheme the purpose or

effect of which is to completely control the employment of employee musicians and their availability to plaintiffs and to the class they represent, and also to control the marketing and price of all musical services in the States of the United States and in Canada; and in carrying said plan and scheme into effect they have persuaded, induced and in some instances coerced orchestra leaders in several States of the United States to join defendants under agreements that as members of defendant organizations, they will not make musical services available to anyone who does not enter into agreements to comply with the aforesaid price and minimums lists.

51. In carrying such plan and scheme into effect defendants, and other members of defendant organizations cooperating and conspiring with defendants, have always notified plaintiffs and the class they represent, in diverse ways and in particular by means of the "*Exhibits*" hereto annexed, that unless plaintiffs and the class they represent enter into contracts in compliance with said price and minimums lists, plaintiffs and the class they represent will not be subject to union discipline and reprisal and they will not be permitted to function as orchestra leaders, will not be permitted to hire musicians, will not be permitted to use facilities controlled by defendants or those in sympathy with defendants; all of which means, in effect, that plaintiffs and the class they represent would not be permitted to function as orchestra leaders and to render musical services in the U. S. A. because of defendants' monopolistic control over musical services and because of the further fact that defendants are operating in collaboration with orchestra leaders who are willing to abide by the exactions of defendants.

52. By reason of the above mentioned acts or torts of defendants and those in concert with them, plaintiffs and the class they represent are threatened with heavy irreparable and immediate loss and damage because of their inability to function in their profession and to secure musi-



cians; because of the instability caused by defendants' arbitrary rules; because of the general interruption and disorganization of their business caused by the above mentioned acts or torts; because of the injury to the advantageous relationships which plaintiffs and the class they represent enjoy with their clients; because defendants impose regulations respecting minimums and in other respects. If defendants are permitted to continue their unlawful combination or conspiracy in restraint of trade and their attempt to monopolize interstate commerce as aforesaid, plaintiffs and the class they represent will be irreparably damaged.

53. Plaintiffs have no adequate remedy at law, and plaintiffs have protested in vain against defendants' said acts and torts. Moreover, no labor dispute within the meaning of the Norris-La-Guardia Act is involved in this action.

WHEREFORE, Plaintiffs demand:

1. That a temporary restraining order and a preliminary injunction issue out of this Court, and upon its order, enjoining and restraining defendants, their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them who receive actual notice of this order by personal services or otherwise during the pendency of this action and until entry of final judgment herein, from

(a) putting into effect, or imposing upon any employer who is a member of defendant labor unions, any of the new "Price List Resolutions" and "New Minimums" made by defendants and promulgated by them in ALLEGRO, (the monthly publication of defendant, Local 802) or otherwise;

(b) interfering in any manner with plaintiffs or any member of the class represented by plaintiffs in the purchase, sale, conducting, hiring, controlling or leading of musical services rendered by employer musicians or employee musicians.

(c) interfering in any way with plaintiffs or the class they represent with employees of plaintiffs or of the class they represent in the playing of any musical instrument or in the rendering of any musical services because of the failure or refusal of plaintiffs (or of the class they represent) to comply with said new "Price List Resolutions" and said "New Minimums".

(d) using in collaboration with employers economic pressures or concerted activities, such as strikes, work stoppages, boycotts, picketing or similar methods for the purpose of enforcing the price fixing arrangements, concluded with employers, which are included in said new "Price List Resolutions" and said "New Minimums";

2. For a permanent injunction, after trial, as hereinabove specified.

3. For a decree of this Court that the aforesaid price list and the contracts coerced or induced by defendants and those in concert with them, which tend to create a monopoly with respect to musical services in the United States are void and that all contracts enter into between employer conductors, orchestra leaders on the one hand and their clients on the other hand which comply with defendants' monopolizing impositions are also void.

4. For a decree ascertaining the damages suffered by plaintiffs by reason of the aforesaid unlawful acts of defendants and awarding judgment in favor of plaintiffs against defendants and each of them for thrice the amount of said damages, costs and a reasonable attorneys fee.

5. For such other and further relief as this Court deems proper.

GODFREY P. SCHMIDT,  
of Counsel

SCHMIDT & McDONALD,  
12 East 41st Street,  
New York 17, N. Y.

**Exhibit H. Annexed to Complaint in 60 Civil 2939****RESOLUTION No. 1**

WHEREAS, There has been no general increase in Club Date Scale since 1955, and

WHEREAS, high living costs impose an ever-increasing hardship on musicians who depend exclusively on Club Dates for a living, and

WHEREAS, Workers in other branches of the Catering business have recently received wage increases, and

WHEREAS, Purchasers of music can afford an increase since music remains a relatively small part of the total party budget, and is indispensable for a successful affair, and

WHEREAS, Leaders' guarantee of additional fees, as provided by union rule, as well as the prerogative of booking in volume and/or over-scale, affords ample earning potential on Club Dates, therefore

BE IT RESOLVED, that a general scale increase be effected for club dates incorporating the following points:

(a) No distinction between afternoon and night jobs shall be made with regard to hours or price, except that Saturday night shall remain a premium night.

(b) When dancing occurs, afternoon or night, four (4) hour jobs shall prevail.

(c) When there is no dancing, three (3) hour jobs shall prevail, except that on Saturday night four (4) hours shall prevail at all times.

(d) Shows shall be \$6.00 extra on all non-continuous jobs.

**BE IT FURTHER RESOLVED**

(e) Class A scale, Sunday to Saturday afternoon, 4 hours, terminating no later than 1:00 A. M., at night jobs,

or if given during the day no later than 7:00 P. M. ....  
\$28.00. Overtime .... \$7.00 an hour.

(f) Class A scale, Sunday to Saturday afternoon, 3  
hours, only when no dancing occurs .... \$21.00. Overtime  
.... \$7.00 an hour.

(g) Class A scale, Saturday night, 4 hours, terminating  
no later than 1:00 A. M. .... \$32.00. Overtime .... \$8.00  
an hour.

(h) Continuous Jobs, Sunday through Saturday after-  
noon \$40.00. Overtime .... \$11.00 an hour.

(i) Continuous Jobs, Saturday night .... \$44.00. Over-  
time \$12.00 an hour.

(j) Fashion Shows, 2 hours .... \$22.00. Overtime \$7.00  
an hour.

(k) Pre-heats, \$9.50 an hour. \$12.00 continuous.

• • • • •

---

**Exhibit J, Annexed to Complaint in 60 Civil 2939**



# SINGLE ENGAGEMENT Contract Blank

## Associated Musicians of Greater New York

LOCAL 802, AMERICAN FEDERATION OF MUSICIANS, NEW YORK 19, N. Y.

THIS CONTRACT for the personal services of musicians, made this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, between the undersigned employer (hereinafter called the "employer") and \_\_\_\_\_ musicians (hereinafter called "employees").  
(Including the Leader)

WITNESSETH, That the employer hires the employees as musicians severally on the terms and conditions below. The leader represents that the employees already designated have agreed to be bound by said terms and conditions. Each employee yet to be chosen shall be so bound by said terms and conditions upon agreeing to accept his employment. Each employee may enforce this agreement. The employees severally agree to render collectively to

the employer services as musicians in the orchestra under the leadership of \_\_\_\_\_ as follows:

Name and Address of Place of Engagement \_\_\_\_\_

Date of Employment \_\_\_\_\_ Welfare \_\_\_\_\_ Cartage \_\_\_\_\_

Type of Engagement \_\_\_\_\_ Name of Room \_\_\_\_\_

Hours of Employment \_\_\_\_\_ Doubling \_\_\_\_\_

Mileage and Transp. \_\_\_\_\_

Price Agreed Upon: \$ \_\_\_\_\_ OVERTIME \$ \_\_\_\_\_ per hour or part thereof.

In the event there is a SHOW of more than 20 Minutes (Cumulative time) to be played, said SHOW must be played by the entire Orchestra, and there will be an additional charge of \$ \_\_\_\_\_ for playing of said SHOW, exclusive of Rehearsal time.

### TOTAL PRICE AGREED UPON \$ \_\_\_\_\_

This price includes expenses agreed to be reimbursed by the employer in accordance with the attached schedule, or a schedule to be furnished the employer on or before the date of engagement.

To be paid \_\_\_\_\_

(Specify when payments are to be made)

Upon request by the American Federation of Musicians of the United States and Canada (herein called the "Federation") or the local in whose jurisdiction the employees shall perform hereunder, the employer either shall make advance payment hereunder or shall post an appropriate bond.

### ADDITIONAL TERMS AND CONDITIONS

If any employees have not been chosen upon the signing of this contract, the leader shall, as agent for the employer and under his instructions, hire such persons and any replacements as are required for persons who for any reason do not perform any or all services. The employer shall at all times have complete control over the services of employees under this contract, and the leader shall, as agent of the employer, enforce disciplinary measures for just cause, and carry out instructions as to selection and manner of performance. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. On behalf of the employer the leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memoranda applied to the employer at or before the commencement of the employment hereunder and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the leader includes the cost of transportation, which will be reported by the leader to the employer.

All employees covered by this agreement must be members in good standing of the Federation. However, if the employment provided for hereunder is subject to the Labor-Management Relations Act, 1917, all employees, who are members of the Federation when their employment commences hereunder, shall be continued in such employment only so long as they continue such membership in good standing. All other employees covered by this agreement, on or before the thirtieth day following the commencement of their employment, or the effective date of this agreement, whichever is later, shall become and continue to be members in good standing of the Federation. The provisions of this paragraph shall not become effective unless and until permitted by applicable law.

To the extent permitted by applicable law, nothing in this contract shall ever be construed so as to interfere with any duty owing by any employee hereunder to the Federation pursuant to its Constitution, By-laws, Rules, Regulations and Orders.

Any employee who is party to or affected by this contract are free in case service hereunder by reason of any strike, lock, unfair list order or requirement of the Federation, and shall be free to accept and engage in other employment of the same or similar character or otherwise, for other employees or persons without any restraint, hindrance, penalty, obligation or liability whatever, any other provisions of this contract to the contrary notwithstanding.

Representatives of the local in whose jurisdiction the employees shall perform hereunder shall have access to the place of performance (except to private residences) for the purpose of conferring with the employees.

The performances to be rendered pursuant to this agreement are not to be recorded, reproduced, or transmitted from the place of performance, in any manner or by any means whatsoever, in the absence of a specific written agreement between the employer and the Federation relating to and permitting such recording, reproduction or transmission.

The employer represents that there does not exist against him, in favor of any member of the Federation, any claim of any kind arising out of social services rendered for any such employer. No employee will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. If the employer breaches this agreement, he shall pay the employee, in addition to damages, 6% interest thereon plus a reasonable attorney's fee.

The employer, in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein, and, if applicable to the services to be rendered hereunder, acknowledges his liability to provide workers' compensation insurance and to pay social security and unemployment insurance taxes.

To the extent permitted by applicable law, there are incorporated into and made part of this agreement, as though fully set forth herein, all of the By-laws, Rules and Regulations of the Federation and of any local of the Federation in whose jurisdiction services are to be performed hereunder (insofar as they do not conflict with those of the Federation), and the employer acknowledges his responsibility to be fully acquainted, now and for the duration of this contract, with the contents thereof.

The undersigned, whether signing this contract as principal, agent or otherwise, in order to induce Local 802, A. F. of M., to approve this contract, personally undertakes to pay, and will be principally responsible for the payment of all sums required to be paid hereunder.

Employer's Name \_\_\_\_\_

Leader's Name \_\_\_\_\_

Local No. \_\_\_\_\_

Signature of Employer \_\_\_\_\_

Signature of Leader \_\_\_\_\_

Membership Card No. \_\_\_\_\_

Street Address \_\_\_\_\_

Street Address \_\_\_\_\_

City \_\_\_\_\_

State \_\_\_\_\_

City \_\_\_\_\_

State \_\_\_\_\_

Phone \_\_\_\_\_

Booking Agent \_\_\_\_\_

If this contract is made by a licensed booking agent, there must be inserted on the reverse side of this contract the name, address and telephone number of the collecting agent of the local in whose jurisdiction the engagement is to be performed.



**TELEPHONE**

**NAMES OF EMPLOYEES**

**LOCAL NUMBER**

**S. S. Nunna**

**WADES**

-(LEADER)

8

**Answer in 60 Civil 2939**

(Tr. pp. 2212-2222)

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

---

[SAME TITLE]

---

Defendants, answering the complaint herein, by Ashe & Rifkin, their attorneys, allege:

1. Deny each and every allegation set forth in paragraphs "1", "23", "27", "29", "30", "35", "36", "37", "38", "39", "40", "41", "42", "43", "44", "45", "46", "47", "48", "49", "50", "51", "52" and "53" of the complaint.

2. Deny knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraphs "3", "4" and "26" of the complaint.

3. Admit that the individual plaintiffs are members in good standing of defendant Local 802 and of defendant American Federation of Musicians; and except as so admitted, deny knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraph "2" of the complaint.

4. Admit that defendant American Federation of Musicians is a labor union; that it is affiliated with the AFL-CIO; that its principal office is located at 425 Park Avenue, New York 22, N. Y.; and that it is an international union, comprising numerous local unions, including defendant Local 802; and, except as so admitted, deny each and every allegation set forth in paragraph "5" of the complaint.

5. Admit that defendant Local 802 is a labor union; that it is affiliated with defendant American Federation



of Musicians; and that its principal office is located at 261 West 52nd Street, New York 19, N. Y.; and, except as so admitted, deny each and every allegation set forth in paragraph "6" of the complaint.

6. Admit that the various local unions affiliated with defendant American Federation of Musicians have their principal offices in various parts of the United States and Canada; that its membership exceeds a total of 260,000 musicians throughout the United States, in Canada, in Puerto Rico and in the Virgin Islands, and consists of performers on musical instruments, including conductors, arrangers and copyists; and, except as so admitted, deny each and every allegation set forth in paragraph "7" of the complaint.

7. Admit that Exhibit C annexed to the complaint is a copy of the "Price List Governing Single and Steady Engagements" of defendant Local 802, revised as of June 1, 1959, as alleged in paragraph "16" of the complaint; and allege further that the term "price list" as used in the said Exhibit is a misnomer, the said Exhibit being in truth and in fact a list of the minimum wage scales at which members of Local 802 are ready and willing to perform labor, and that such wage scales were established, and have been established for more than forty (40) years, by the members of Local 802 themselves.

8. Admit that Exhibit D annexed to the complaint is a copy of the "Single Engagement Minimums" of defendant Local 802, revised as of June 1, 1959, as alleged in paragraph "17" of the complaint; and allege further that the said Exhibit lists additional minimum working conditions under which members of Local 802 are ready and willing to perform labor, and that such minimum conditions were established, and have been established for many years, by the members of Local 802 themselves.

9. Admit that Exhibit E annexed to the complaint is a copy of the "Wage Scales, Rules and Regulations Gov-

erning Steamships", published by defendant Local 802, as alleged in paragraph "18" of the complaint; and allege further that the said Exhibit lists the minimum wage scales and working conditions under which members of Local 802 are ready and willing to perform labor on steamships; and that such minimum wage scales and conditions were established, and have been established for many years, by the members of Local 802 themselves.

10. Admit that Exhibit F annexed to the complaint is a copy of the "By-Laws Affecting Traveling Members", published by defendant American Federation of Musicians, as alleged in paragraph "19" of the complaint; and allege further that the said Exhibit lists the minimum conditions under which members of the American Federation of Musicians are ready and willing to perform labor when traveling, and that such minimum conditions were established, and have been established for many years, by the members of the American Federation of Musicians through their chosen delegates and representatives.

11. Admit that Exhibit G annexed to the complaint is a copy of a notice appearing in the June 1960 issue of "Allegro", listing revisions of Exhibit D annexed to the complaint, as alleged in paragraph "20" of the complaint; and allege further that the said revisions were adopted in the same manner and under the same procedures as have been followed for many years in defendant Local 802 for the establishment of such "minimums".

12. Admit that Exhibit H annexed to the complaint sets forth changes in the "Price List Governing Single and Steady Engagements" (Exhibit C), as alleged in paragraph "22" of the complaint; and allege further that the term "price list" as used in the said Exhibit is a misnomer, the changes set forth in the said Exhibit being in truth and in fact changes in the minimum wage scales at which members of Local 802 are ready and willing to perform labor, and that such changes were adopted in

the same manner and under the same procedures as have been followed for many years in defendant Local 802 for the establishment of such minimum wage scales.

13. Admit that Exhibit B and C annexed to the complaint set forth the distinction between single and steady engagements; and, except as so admitted, deny each and every allegation set forth in paragraph "24" of the complaint.

14. Admit that defendant Local 802 has about 30,000 members, including the individual plaintiffs; and, except as so admitted, deny each and every allegation set forth in paragraph "25" of the complaint.

15. Admit that defendants American Federation of Musicians and Local 802 admit orchestra conductors or leaders to membership; and, except as so admitted, deny each and every allegation set forth in paragraph "28" of the complaint.

16. Admit that defendants American Federation of Musicians and Local 802 are labor organizations; and, except as so admitted, deny each and every allegation set forth in paragraph "31" of the complaint.

17. Admit that the By-Laws of the defendant American Federation of Musicians require members to include certain provisions in all contracts for the rendition of musical services, and that Exhibits J and K annexed to the complaint are examples of forms of contract containing such provisions; and, except as so admitted, deny each and every allegation set forth in paragraph "32" of the complaint.

18. Admit that Exhibits A and B annexed to the complaint constitute contracts between the defendant unions and their respective memberships; and, except as so admitted, deny each and every allegation set forth in paragraph "3" of the complaint.

19. Admit that the individual plaintiffs have refused to comply with the provisions of the new minimum wage

scales and the minimum number of musicians to perform on various types of engagements, but allege further that the said plaintiffs have for many years complied with previous minima which were established in the same manner and under the same procedures as were employed in establishing the new minima; and, except as so admitted, deny each and every allegation set forth in paragraph "34" of the complaint.

#### AS AND FOR A FIRST COMPLETE DEFENSE

20. Plaintiffs and defendants are engaged in the same industry, trade, craft or occupation, to wit, the musical entertainment industry, and plaintiffs are members of the defendant organizations of employees.

21. A controversy concerning terms or conditions of employment and concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment exists between plaintiffs and defendants, arising out of plaintiffs' claim that they are "employers" and that terms or conditions of employment are being imposed upon them by their "employees" through the defendant labor unions without bargaining or agreement.

22. By reason of the foregoing, this action involves and grows out of a labor dispute as defined in Section 13 of the Norris-LaGuardia Act (29 USCA, Sections 101-115), and pursuant to the provisions of the said Act this Court does not have jurisdiction to issue the injunction sought by plaintiffs herein.

#### AS AND FOR A SECOND COMPLETE DEFENSE

23. Defendants American Federation of Musicians and Local 802 are labor unions, and as such represent their members in connection with the rendition of labor by such members in the performance of musical services.



24. The labor of the said members in the performance of musical services is not a commodity or article of commerce, and the defendants, in carrying on the activities of which plaintiffs complain, are pursuing legitimate labor union objectives in the self-interest of their members by establishing minimum wage scales and other minimum conditions of employment for said members.

25. By reason of the foregoing, the defendants' acts of which plaintiffs complain are immunized from injunctive restraint under the Sherman Act (15 USCA, Sections 1 and 2) by the provisions of the Clayton Act (15 USCA, Section 17; 28 USCA, Section 52).

#### AS AND FOR A THIRD COMPLETE DEFENSE

26. Repeat and reiterate each and every allegation set forth in paragraphs "20" and "21", of this answer as if herein more fully and at length set forth.

27. The primary and exclusive jurisdiction to determine the issues of whether the individual plaintiffs are employers and whether defendants are required to bargain collectively with them is vested in the National Labor Relations Board under the National Labor Relations Act as amended (29 USC, Ch. 7).

28. Plaintiffs, recognizing the said jurisdiction of the National Labor Relations Board, on or about March 14, 1960 filed a charge with the said Board against defendant Local 802 (NLRB Case No. 2-CB-2855), alleging that Local 802 was engaging in unfair labor practices within the meaning of Section 8(b) (1) and (3) of the said National Labor Relations Act, in that plaintiffs were employers and Local 802 was refusing to bargain collectively with them as to one part of the aforesaid "price list."

29. The National Labor Relations Board's Regional Director, after a thorough investigation of the facts, re-

fused to issue a complaint "because there is insufficient evidence of any violation of the Act", and, on an appeal taken by plaintiffs, the said ruling was upheld by the Board's General Counsel.

30. By reason of the foregoing, this Court is preempted from jurisdiction to determine the subject matter of this action.

#### AS AND FOR A FOURTH COMPLETE DEFENSE

31. The performance of a single musical engagement by plaintiffs or by any other members of the defendant labor unions, no matter where performed, is a purely local affair and does not constitute interstate commerce within the meaning of Sections 1 and 12 of the aforesaid Sherman Act.

32. By reason of the foregoing, the defendants' acts complained of by plaintiffs cannot and do not constitute violations of the said Sherman Act, and this Court is without jurisdiction over the subject matter of this action.

#### AS AND FOR A FIFTH COMPLETE DEFENSE

33. Repeat and reiterate each and every allegation set forth in paragraphs "7", "8", "9", "10", "11" and "12" of this answer, as if herein more fully and at length set forth.

34. The individual plaintiffs have been members of the defendant labor unions for more than fifteen years and throughout the said period they accepted the aforesaid minimum wage scales and working conditions and the manner in which they were established and applied.

35. By reason of the foregoing, plaintiffs have been guilty of laches which debar them for any equitable relief such as they seek in this action.

### AS AND FOR A SIXTH COMPLETE DEFENSE

36. Repeat and reiterate each and every allegation set forth in paragraphs "7", "8", "9", "10", "11", "12", "34" and "35" of this answer, as if herein more fully and at length set forth.

37. The pattern under which the defendant labor unions operate with respect to single engagements has been set for so many years that the issuance of an injunction at this time would cause more harm to the defendants and their thousands of members than it would benefit plaintiff.

38. By reason of the foregoing, plaintiffs are not entitled to any equitable relief.

### AS AND FOR A SEVENTH COMPLETE DEFENSE:

39. Repeat and reiterate each and every allegation set forth in paragraphs "3" and "18" of this answer, as if herein more fully and at length set forth.

40. At all times mentioned in the complaint herein, the By-Laws of defendant American Federation of Musicians (Exhibit A, annexed to the complaint herein) have provided and still provide, in Article 8, Section 1 and 2:

"Section 1. An appeal can be made to The International Executive Board from any decision, of whatever kind, of a Local or any other authority. A further appeal can be made to a Convention in any case involving an ultimate fine of \$500.00 or more, or expulsion from membership in the Federation, regardless of whether the original decision was made by a local or by the International Executive Board".

"Section 2. In the event of an appeal to the International Executive Board or to a Convention the appellant may request a stay of judgment from the International President, who shall decide whether or not the appellant is entitled to same".



41. The foregoing provisions of the By-Laws of defendant American Federation of Musicians have provided and still provide ample and complete remedies for the alleged grievances of the individual plaintiffs which constitute the basis of their complaint herein.

42. The individual plaintiffs have not taken or attempted to take the aforesaid appeals as provided in the said By-Laws.

43. By reason of the foregoing, the individual plaintiffs have instituted and still prosecute this action without having first exhausted the means of redress provided by the said By-Laws of defendant American Federation of Musicians, and they are, therefore, not entitled to any of the relief sought by them in this action.

AS AND FOR AN EIGHTH COMPLETE DEFENSE AS  
AGAINST PLAINTIFF ASSOCIATION:

44. Plaintiffs Orchestra Leaders of Greater New York, and Charles Turecamo and Joseph Carroll as Treasurer and Secretary thereof have not alleged in the complaint herein that the said plaintiffs in the said capacities have been injured in their business or property by any of the acts alleged to have been committed by defendants, and the said plaintiffs in the said capacities have not in fact been so injured.

45. By reason of the foregoing, the said plaintiffs have no standing to institute this action under the provisions of the Sherman Act, and are not entitled to the relief sought by them herein.

AS AND FOR A NINTH COMPLETE DEFENSE:

46. Plaintiffs cannot fairly insure the adequate representation of all members of the class for which they presume to bring this action, nor does their complaint herein define the members of the said class who are alleged to be

similarly situated as plaintiffs or that the said alleged class does not include persons of hostile, antagonistic or differing interests.

47. By reason of the foregoing, no class action is authorized herein by Rule 23 of the Federal Rules of Civil Procedure.

WHEREFORE, defendants, respectfully pray for judgment dismissing the complaint herein, together with the costs and disbursements of this action.

Dated: November 9th, 1960.

ASHE & RIFKIN  
Attorneys for Defendants  
305 Broadway  
New York 7, N. Y.

By DAVID I. ASHE,  
A Member of the Firm.

---

**Complaint in 60 Civil 4926**

(Tr. pp. 3245-3256)

**UNITED STATES DISTRICT COURT**

**FOR THE SOUTHERN DISTRICT OF NEW YORK**

**[SAME TITLE]**

Plaintiffs, by SCHMIDT & McDONALD, their attorneys, for their complaint, allege:

1. This action arises under the Laws of the United States, specifically the Sherman and Clayton Anti-Trust Acts (15 U. S. Code, sections 1, 2, 15 and 26); and under the laws of the State of New York, specifically, section 340 of the General Business Law of the State of New York; and under the common law of the State of New York.

2. Plaintiffs, JOSEPH CARROLL and CHARLES PETERSON are orchestra leaders and are, and for many years have been, members in good standing of LOCAL 802 ASSOCIATED MUSICIANS OF GREATER NEW YORK, (hereinafter referred to as LOCAL 802 and of defendant, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA). Their business addresses are respectively: 174 East 74th Street, New York 21, N.Y., and 110 West 34th Street, New York 1, N. Y.

3. Plaintiff, ORCHESTRA LEADERS OF GREATER NEW YORK, an unincorporated association within the meaning of the General Associations Law of the State of New York. Its membership comprises of more than ten orchestra leaders, all of whom are members of defendant unions and some of whom belong to other Locals affiliated with the AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA. Its office is located at 174 East 74th Street, New York 21, N.Y.

4. Plaintiffs, CHAS. TURECAMO and JOSEPH CARROLL, are the Treasurer and the Secretary, respectively, of ORCHESTRA LEADERS OF GREATER NEW YORK.

5. Defendant, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, (hereinafter called INTERNATIONAL ORGANIZATION) is (with the qualification alleged below) a labor union or labor organization within the meaning of Section 3, subdivision i, of the Labor-Management Reporting and Disclosure Act of 1959. It is affiliated with the AFL-CIO and its principal office is located at 425 Park Avenue, New York 22, N. Y. It is an international union, comprising numerous local unions, one of which is defendant LOCAL 802.

6. Defendant, LOCAL 802, is (with the qualification alleged below) a Labor organization within the meaning of Section 3, subdivision i, of the Labor-Management Reporting and Disclosure Act of 1959; it is affiliated with (a) the

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, as one of its locals and (b) the AFL-CIO. Its principal office is located at 26 West 52nd Street, New York 19, N. Y.

7. The various locals affiliated with defendant, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, have their principal offices in various States of the United States and in Canada, and their membership exceeds a total of 260,000 orchestra leaders and sidemen in practically every State of the United States, in Canada, in Puerto Rico, and in the Virgin Islands.

8. Defendant, HERMAN D. KENIN is, and for some time past has been, President of the INTERNATIONAL ORGANIZATION.

9. Defendant, STANLEY BALLARD is, and for some time past has been, Secretary of the INTERNATIONAL ORGANIZATION.

10. Defendant, GEORGE V. CLANCY is, and for some time past has been, Treasurer of the INTERNATIONAL ORGANIZATION.

11. Defendant, AL MANUTI is, and for some time past has been, President of LOCAL 802.

12. Defendant, MAX L. ARONS is, and for some time past has been, Secretary of LOCAL 802.

13. Defendant, HI JAFFE is, and for some time past has been, Treasurer of LOCAL 802.

14. LOCAL 802, regularly publishes an official, printed magazine entitled "ALLEGRO", which is issued monthly.

15. Annexed hereto, marked "Exhibit A", to form part of this complaint is a copy of a notice appearing in ALLEGRO (issue of November, 1960) by which defendants established a "General Scale Increase for Special Class Club Dates".

16. Plaintiffs bring this action for themselves and for all members (so numerous as to make it impractical to bring them all before the Court) of LOCAL 802 and of the INTERNATIONAL ORGANIZATION who are similarly situated; and this complaint raises common rights; and a common relief is sought herein; and the object of this action is the adjudication of claims which do or may seriously affect the specific property rights of plaintiffs and of said class; and this class action is authorized by Rule 23 of the Federal Rules of Civil Procedure.

17. Plaintiffs and the class they represent, are: (a) employers who regularly employ sidemen or employee musicians who are members of the INTERNATIONAL ORGANIZATION, of LOCAL 802 and of other locals affiliated with the INTERNATIONAL ORGANIZATION; and (b) independent contractors who are largely engaged in the single engagement field; i.e., they are hired *ad hoc* by clients to furnish musical services for weddings, banquets, dances and other occasions which are not steady engagements.

18. Defendant, LOCAL 802, has a membership of some thirty thousand (30,000) members, including plaintiffs and the class they represent.

19. Plaintiffs, and the class they represent as employers and independent contractors, frequently fulfill single engagements outside of the State in which they usually operate and in which their principal offices are located. Plaintiffs and the class they represent gross millions of dollars of income per year from such engagements in various States of the United States in connection with which they render musical services outside of the State in which they usually operate or in which their principal offices are found. Many of the purchasers of such musical services (the clients whom plaintiffs and the class they represent serve) are large companies engaged in interstate or foreign commerce. Many of the sidemen or musicians employed by plaintiffs and the class they represent derive, each year,



hundreds of thousands of dollars from rendering their musical services in various States of the United States outside of the State in which they reside or in which they usually render such musical services.

20. Plaintiffs, as independent contractors and employers, operate their several businesses independently; have their own usual and occasional clientele, employ sidemen or musicians for each particular occasion, direct such musicians themselves or assign directors for them, control or discipline such employees, conduct all negotiations leading to engagements, regulate the style and manner of performance by their orchestras during such engagements and regularly and necessarily employ their sidemen and musicians to assist them in carrying out their engagements which they cannot fulfill without such assistance. The named plaintiffs commonly provide such musical services regularly in New York, New Jersey, Connecticut and Pennsylvania as well as other States.

21. Defendants, as a matter of long standing practice and policy, have insisted and do insist that orchestra leaders, especially those engaged in the single engagement field, shall become and remain members in good standing of the local unions affiliated with defendant, INTERNATIONAL ORGANIZATION.

22. Such insistence has been enforced from time to time by strikes, boycotts, picketing and other concerted action or by threat of such action; and the threat of such action affects the interstate and intrastate business involvement of the plaintiffs and the class they represent and their employees and sidemen.

23. Defendant labor organizations are undoubtedly labor unions or labor organizations within the meaning of State and Federal laws governing labor relations when they purport to act on behalf of employees in collective bargaining; but when they purport to act on behalf of any com-

bination, arrangement or conspiracy between certain employers and themselves, they do not act as labor unions or labor organizations, and it is impossible for said defendant unions simultaneously and without conflict of interest to represent plaintiffs and the class they represent (employer orchestra leaders) on the one hand and the employees of such orchestra leaders on the other hand.

24. The Constitution and By-Laws of defendant labor unions constituted contracts (or purported contracts where membership is not free but coerced) obligating plaintiffs and the class they represent as well as defendants and also all musicians at any time employed by plaintiffs and the class they represent. However, such contracts or purported contracts are in most cases not willingly assumed by employing orchestra leaders because many of them have been coerced into membership in defendant unions upon the basis of boycotts, strikes, picketing and other forms of concerted economic pressure or reprisal or upon the basis of threat of such pressure or reprisal.

25. Some orchestra leaders, including plaintiffs have refused to comply with the impositions upon employers and employees made by defendants in the form of wage scales, price lists and minimum and amendments thereof; while other orchestra leaders cooperate with defendants in fulfilling such price lists and minimums.

26. Defendants implement their monopoly of power by imposing at times upon the plaintiffs and the class they represent the equivalent of the obligations of a labor contract without ever indulging in collective bargaining; they also impose upon plaintiffs and the class they represent the aforesaid scales, price lists and minimums without bargaining or agreement of any kind; they depend upon their monopoly position from which they control employee and employer musicians, for the purpose of inducing or coercing willing or unwilling, cooperation from orchestra leaders in applying the minimums and scales and prices aforesaid.

27. Defendants, in combination or cooperation with certain orchestra leaders, have arranged and are presently arranging or conspiring to fix prices for musical service in the United States by requiring plaintiffs and the class they represent to agree to the scales, minimums and prices aforesaid.

28. The typical agreements enacted by defendants from all orchestra leaders as employers or independent contractors incorporate all of the restrictive practices and features herein complained of.

29. Defendants have in purpose or effect monopolized and are attempting to monopolize by the aforesaid arrangements and combination the marketing and sale of musical services throughout the United States and especially in the Greater New York area; and they have restrained, and have been and are engaged in a combination and conspiracy to restrain competition in the marketing of such musical services and to restrain trade and commerce among the several states all in violation of the Sherman Anti-Trust Act (15 U. S. Code Sections 1 and 2); and defendants' activities also constitute a violation of section 340 of the General Business Law of the State of New York.

30. The regulations aforesaid (especially the price list and minimum made and promulgated by defendants) constitute a contract, combination or conspiracy in restraint of trade or commerce among the several states, because defendants collaborate with and exact compliance from a significant number of orchestra leaders who employ musicians and sidemen and who willingly comply with defendants' said regulations.

31. Defendants by said price list and minimum list and by their policy and practice as herein set forth restrict competition by unlawful restraints of trade and engage in unfair methods of competition.

\*32. The purpose or effect of defendants by their aforesaid policy and practice and by the said regulations is to eliminate or destroy competition or competitive business from the single and steady engagement field and to unduly and unreasonably restrict in that field the freedom of plaintiffs and these similarly situated to enter into normal business contracts or to fulfill them by access to the labor market.

33. The purpose or effect of defendants' aforesaid policy and practice, as well as their price and minimum lists, is to impose restraints upon commerce within the State of New York which have a significant impact and influence upon commerce between the several states; and such appreciable local contractual and other restraints upon commerce exert in turn a substantial influence or effect upon commerce between the states.

34. The purpose or effect of defendants' aforesaid policy and practice, as well as of the aforesaid price and minimum lists, is solely to control prices in the single and steady engagement field.

35. The purpose or effect of defendants' aforesaid policy and practice and of said minimums and price lists is to foreclose access to a free market in musical services and to effectuate, within defendant unions and the circle of co-operating orchestra leaders or employers a monopoly controlling, on a national basis, the market for musical services.

36. By their aforesaid scales, price and minimum lists, defendants fix prices of all of most musical services coming within the stream of inter-state commerce.

37. The purpose or effect of defendants by the aforesaid policy, practice and lists is to boycott all third parties or to visit upon them other economic reprisals unless they fall into line with defendants' aforesaid contract, combination, conspiracy or arrangement in restraint of trade.

38. The purpose or effect of the aforesaid policy, practice and lists of defendants is to cause an unnatural increase in the general level of prices for musical services within the area of interstate commerce and to exclude other competitors from the market for such musical services; and to effect bankruptcy or serious financial loss to orchestra leaders who, like plaintiffs and the class they represent, refuse to comply with the aforesaid policy, practice and lists of the defendants.

39. Defendants have also formed a common law conspiracy to commit the above mentioned acts and torts against plaintiffs and the class they represent and in violation of law have conspired to interfere, and have in fact interfered, with reciprocal relationships between plaintiffs and the class they represent on the one hand and the clients who retain said plaintiffs and said class as independent contractors on the other hand.

40. Insofar as defendant labor organizations do and have done and are continuing to do the aforesaid things and commit the aforesaid acts and torts, they are not bona fide labor organizations within the meaning of state and federal relations laws and they cannot properly avail themselves of any statutory privileges and immunities enjoyed by genuine labor organizations.

41. Defendants by the arrangements or conspiracy aforesaid have entered into a plan and scheme the purpose or effect of which is to completely control the employment of employee musicians and their availability to plaintiffs and the class they represent, and also to control the marketing and price of all musical services in the States of the United States and in Canada; and in carrying said plan and scheme into effect they have persuaded, induced and in some instances coerced orchestra leaders in several states of the United States to join defendants under agreements that as members of defendant organizations, they



will not make musical services available to anyone who does not enter into agreements to comply with the aforesaid prices and minimums lists.

42. In carrying such plan and scheme into effect, defendants, and other members of defendant organizations cooperating and conspiring with defendants, have always notified plaintiffs and the class they represent, in diverse ways and in particular by means of the "*Exhibits*" hereto annexed, that unless plaintiffs and the class they represent, enter into contracts in compliance with said price and minimum lists, plaintiffs and the class they represent will not be subject to union discipline and reprisal and they will not be permitted to function as orchestra leaders, will not be permitted to hire musicians, will be permitted to use facilities controlled by defendants or those in sympathy with defendants, which means, in effect, that plaintiffs and the class they represent would not be permitted to function as orchestra leaders and to render musical services in the U. S. A. because of defendants' monopolistic control over musical services and because of the further fact that defendants are operating in collaboration with orchestra leaders who are willing to abide by the exactions of defendants.

43. By reasons of the above mentioned acts or torts of defendants and those in concert with them, plaintiffs and the class they represent are threatened with heavy irreparable and immediate loss and damage because of their inability to function in their profession and to secure musicians; because of the instability caused by defendants' arbitrary rules; because of the general interruption and disorganization of their business caused by the above mentioned acts or torts; because of the injury to the advantageous relationship which plaintiffs and the class they represent enjoy with their clients; because defendants impose regulations respecting minimums and in other respects. If defendants are permitted to continue their unlawful combination or conspiracy in restraint of trade

and their attempt to monopolize inter-state commerce as aforesaid plaintiffs and the class they represent will be irreparably damaged.

44. Plaintiffs have no adequate remedy at law, and plaintiffs have protested in vain against defendants said acts and torts. Moreover, no labor dispute within the meaning of the Norris-LaGuardia Act is involved in this action.

WHEREFORE Plaintiffs demand:

1. That a temporary restraining order and a preliminary injunction issue out of this Court, and upon its order, enjoining and restraining defendants, their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them who receive actual notice of this order by personal services or otherwise during the pendency of this action and until entry of final judgment herein, from

(a) putting into effect, or imposing upon any employer who is a member of defendant labor unions, any of the new "General Scale Increases" made by defendants and promulgated by them in ALLEGRO, (the monthly publication of defendant, Local 802) or otherwise;

(b) interfering with plaintiffs in any manner or interfering with any member of the class represented by plaintiffs, in the purchase, sale, conducting, hiring, controlling or leading of musical services rendered by employer musicians or employee musicians.

(c) interfering in any way with plaintiffs or the class they represent in the playing of any musical instrument or in the rendering of any musical services because of the failure or refusal of plaintiffs (or of the class they represent) to comply with said new "General Scale Increase".

(d) using in collaboration with employers economic pressures or concerted activities, such as strikes, work

stoppages, boycotts, picketing or similar methods for the purpose of enforcing the price fixing arrangements in said new "General Scale Increase".

2. For a permanent injunction, after trial, as hereinabove specified;

3. For a decree of this Court that the aforesaid "General Scale Increase" tends to create a monopoly with respect to musical services in the United States and are void and that all contracts entered into between employer conductors, orchestra leaders on the one hand and their clients on the other hand which comply with defendants' monopolizing impositions are also void;

4. For a decree ascertaining the damages suffered by plaintiffs by reason of the aforesaid unlawful acts of defendants and awarding judgment in favor of plaintiffs against defendants and each of them for thrice the amount of said damages, costs and a reasonable attorney's fee.

5. For such other and further relief as this Court deems proper.

GODFREY P. SCHMIDT,  
of Counsel,

SCHMIDT & McDONALD,  
60 East 42nd St.,  
New York 17, N. Y.

**Exhibit A, Annexed to Complaint in 60 Civil 4926****ALLEGRO****GENERAL SCALE INCREASE****SPECIAL CLASS CLUB DATES**

*The following increases in scales for Special Class were adopted by the Executive Board on October 27, 1960.*

- (a) No distinction between afternoon and night jobs shall be made with regard to hours or price, excepting that Saturday night shall remain a premium night.
- (b) When dancing occurs, afternoon or night, four (4) hour jobs shall prevail.
- (c) Where there is no dancing, three (3) hour jobs shall prevail, except that on Saturday night four (4) hours shall prevail at all times.
- (d) Shows shall be \$6.00 extra on all non-continuous jobs.
- (e) Special Class Scale: Sunday to Saturday afternoon, four (4) hours terminating no later than 1:00 A. M., at night jobs, or if given during the day no later than 7:00 P. M., \$24.00. Overtime, \$6.00 per hour.
- (f) Special Class Scale: Sunday to Saturday afternoon, three (3) hours, only when no dancing occurs, \$18.00. Overtime, \$6.00 per hour.
- (g) Special Class Scale; Saturday night, four (4) hours terminating no later than 1:00 A. M., \$28.00. Overtime, \$7.00 per hour.
- (h) Special Class Scale: Continuous jobs. Sunday to Saturday afternoon, \$36.00. Overtime, \$10.00 per hour.

- (i) Special Class Scale: Continuous jobs, Saturday night, \$40.00. Overtime, \$11.00 per hour.
- (j) Fashion Shows, two (2) hours, \$20.00. Overtime, \$6.00 per hour.
- (k) Special Class Scale: \$9.50 per hour. \$11.00 for continuous for Pre-Heats.

Effective Date:

DECEMBER 15, 1960

---

**Answer of Defendant Local 802 in 60 Civil 4926**

(Tr. pp. 3303-3311)

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

---

[SAME TITLE]

---

Defendants ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, and AL MANUTI as President, MAX L. ARONS, as Secretary and HI JAFFE, as Treasurer of LOCAL 802, answering the complaint herein, by Ashe & Rifkin, their attorneys, allege:

1. Deny each and every allegation set forth in paragraphs "1", "16", "17", "20", "22", "26", "27", "28", "29", "30", "31", "32", "33", "34", "35", "36", "37", "38", "39", "40", "41", "42", "43" and "44" of the complaint.
2. Admit that the individual plaintiffs are members in good standing of defendant Local 802 and of the American Federation of Musicians and, except as so admitted, deny knowledge or information sufficient to form a belief as to



each and every allegation set forth in paragraph "2" of the complaint.

3. Deny knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraphs "3", "4" and "19" of the complaint.

4. Admit that the American Federation of Musicians is a labor union, affiliated with the AFL-CIO, having its principal office at 425 Park Avenue, New York 22, N. Y.; and that it is an international union, consisting of numerous local unions, including defendant Local 802; and, except as so admitted, deny each and every allegation set forth in paragraph "5" of the complaint.

5. Admit that defendant Local 802 is a labor union; that it is affiliated with defendant American Federation of Musicians; and that its principal office is located at 261 West 52nd Street, New York 19, N. Y.; and, except as so admitted, deny each and every allegation set forth in paragraph "6" of the complaint.

6. Admit that the various local unions affiliated with American Federation of Musicians have their principal offices in various parts of the United States and Canada; that its membership exceeds a total of 260,000 musicians throughout the United States, in Canada, in Puerto Rico and in the Virgin Islands, and consists of performers on musical instruments, including conductors, arrangers and copyists; and, except as so admitted, deny each and every allegation set forth in paragraph "7" of the complaint.

7. Admit that defendant Local 802 has about 30,000 members, including the individual plaintiffs; and except as so admitted, deny each and every allegation set forth in paragraph "18" of the complaint.

8. Admit that the American Federation of Musicians and defendant Local 802 admit orchestra conductors or leaders to membership; and, except as so admitted, deny

each and every allegation set forth in paragraph "21" of the complaint.

9. Admit that the American Federation of Musicians and defendant Local 802 are labor organizations; and, except as so admitted, deny each and every allegation set forth in paragraph "23" of the complaint.

10. Admit that the Constitutions and By-Laws of the American Federation of Musicians and of defendant Local 802 constitute contracts between the said Unions and their respective memberships; and, except as so admitted, deny each and every allegation set forth in paragraph "24" of the complaint.

11. Admit that the individual plaintiffs have refused to comply with the provisions of the new minimum wage scales and the minimum number of musicians to perform on various types of engagements, but allege further that the said plaintiffs have for many years complied with previous minima which were established in the same manner and under the same procedures as were employed in establishing the new minima; and, except as so admitted and alleged, deny each and every allegation set forth in paragraph "25" of the complaint.

#### AS AND FOR A FIRST COMPLETE DEFENSE:

12. Plaintiffs, the American Federation of Musicians, and defendant Local 802 are engaged in the same industry, trade, craft or occupation, to wit, the musical entertainment industry, and plaintiffs are members of the said American Federation of Musicians and of defendant Local 802, both of which are organizations of employees.

13. A controversy concerning terms or conditions of employment and concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or condition of employment exists between plaintiffs and the American Federation of

Musicians and defendant Local 802 arising out of plaintiffs' claims that they are "employers" and that terms or conditions of employment are being imposed upon them by their "employees" through the aforesaid labor unions without bargaining or agreement.

14. By reason of the foregoing, this action involves and grows out of a labor dispute as defined in Section 13 of the Norris-LaGuardia Act (29 USCA, Sections 101-115) and pursuant to the provisions of the said Act this Court does not have jurisdiction to issue the injunction sought by plaintiffs herein.

AS AND FOR A SECOND COMPLETE DEFENSE:

15. The American Federation of Musicians and the defendant Local 802 are labor unions, and as such represent their members in connection with the rendition of labor by such members in the performance of musical services.

16. The labor of the said members in the performance of musical services is not a commodity or article of commerce, and the American Federation of Musicians and defendant Local 802 in carrying on the activities of which plaintiffs complain, are pursuing legitimate labor union objectives in the self-interest of their members by establishing minimum scales and other minimum conditions of employment for said members.

17. By reason of the foregoing, the acts of which plaintiffs complain are immunized from injunctive restraint under the Sherman Act (15 USCA, Sections 1 and 2) by the provisions of the Clayton Act (15 USCA, Section 17; 29 USCA, Section 52).

AS AND FOR A THIRD COMPLETE DEFENSE:

18. Repeat and reiterate each and every allegation set forth in paragraphs "12" and "13" of this answer as if herein more fully and at length set forth.

19. The primary and exclusive jurisdiction to determine the issues of whether the individual plaintiffs are employers and whether defendants are required to bargain collectively with them is vested in the National Labor Relations Board under the National Labor Relations Act as amended (29 USC, Ch. 7).

20. Plaintiffs, recognizing the said jurisdiction of the National Labor Relations Board, on or about March 14, 1960 filed a charge with the said Board against defendant Local 802 (NLRB Case No. 2-CB-2855), alleging that Local 802 was engaging in unfair labor practices within the meaning of Section 8(b)(1) and (3) of the said National Labor Relations Act, in that plaintiffs were employers and Local 802 was refusing to bargain collectively with them as to one part of the aforesaid "price list".

21. The National Labor Relations Board's Regional Director, after a thorough investigation of the facts, refused to issue a complaint "because there is insufficient evidence of any violation of the Act", and, on an appeal taken by plaintiffs, said ruling was upheld by the Board's General Counsel.

22. By reason of the foregoing, this Court is preempted from jurisdiction to determine the subject matter of this action.

#### AS AND FOR A FOURTH COMPLETE DEFENSE:

23. The performance of a single musical engagement by plaintiffs or by any other members of the American Federation of Musicians, or of defendant Local 802, no matter where performed, is a purely local affair and does not constitute interstate commerce within the meaning of Sections 1 and 2 of the aforesaid Sherman Act.

24. By reason of the foregoing, the acts complained of by plaintiffs cannot and do not constitute violations of the said Sherman Act, and this Court is without jurisdiction over the subject matter of this action.

AS AND FOR A FIFTH COMPLETE DEFENSE:

25. The "General Scale Increase for Special Class Club Dates", as set forth in "Exhibit A" annexed to the complaint, are a list of minimum wage scales at which members of defendant Local 802 are ready and willing to perform labor, and that such wage scales were established, and have been established for more than forty (40) years, by the members of Local 802 themselves.

26. The individual plaintiffs have been members of the defendant Local 802 for more than fifteen years and throughout the said period they accepted the aforesaid minimum wage scales and working conditions and the manner in which they were established and applied.

27. By reason of the foregoing, plaintiffs have been guilty of laches which debar them for any equitable relief such as they seek in this action.

AS AND FOR A SIXTH COMPLETE DEFENSE:

28. Repeat and reiterate each and every allegation set forth in paragraph "25" of this answer, as if herein more fully and at length set forth.

29. The pattern under which defendant Local 802 operates with respect to single engagements has been set for so many years that the issuance of an injunction at this time would cause more harm to Local 802 and its thousands of members than it would benefit plaintiffs.

30. By reason of the foregoing, plaintiffs are not entitled to any equitable relief.

AS AND FOR A SEVENTH COMPLETE DEFENSE:

31. Repeat and reiterate each and every allegation set forth in paragraphs "2" and "10" of this answer as if herein more fully and at length set forth.



32. At all times mentioned in the complaint herein, the By-Laws of the American Federation of Musicians have provided and still provide, in Article 8, Sections 1 and 2:

"Section 1. An appeal can be made to The International Executive Board from any decision, of whatever kind, of a Local or any other authority. A further appeal can be made to a Convention in any case involving an ultimate fine of \$500.00 or more, or expulsion from membership in the Federation, regardless of whether the original decision was made by a Local or by the International Executive Board."

"Section 2. In the event of an appeal to the International Executive Board or to a Convention the appellant may request a stay of judgment from the International President, who shall decide whether or not the appellant is entitled to same".

33. The foregoing provisions of the By-Laws of the American Federation of Musicians have provided and still provide ample and complete remedies for the alleged grievances of the individual plaintiffs which constitute the basis of their complaint herein.

34. The individual plaintiffs have not taken or attempted to take the aforesaid appeals as provided in the said By-Laws.

35. By reason of the foregoing, the individual plaintiffs have instituted and still prosecute this action without having first exhausted the means of redress provided by the said By-Laws of defendant American Federation of Musicians, and they are, therefore, not entitled to any of the relief sought by them in this action.

AS AND FOR AN EIGHTH COMPLETE DEFENSE AS  
AGAINST PLAINTIFF ASSOCIATION:

36. Plaintiffs Orchestra Leaders of Greater New York, and Charles Turecamo and Joseph Carroll as Treasurer

and Secretary thereof have not alleged in the complaint herein that the said plaintiffs in the said capacities have been injured in their business or property by any of the acts alleged to have been committed by defendants, and the said plaintiffs in the said capacities have not in fact been so injured.

37. By reason of the foregoing, the said plaintiffs have no standing to institute this action under the provisions of the Sherman Act, and are not entitled to the relief sought by them herein.

**AS AND FOR A NINTH COMPLETE DEFENSE:**

38. Plaintiffs cannot fairly insure the adequate representation of all members of the class for which they presume to bring this action, nor does their complaint herein define the members of the said class who are alleged to be similarly situated as plaintiffs or that the said alleged class does not include persons of hostile, antagonistic or differing interests.

39. By reason of the foregoing, no class action is authorized herein by Rule 23 of the Federal Rules of Civil Procedure.

WHEREFORE, defendant Local 802 respectfully prays for judgment dismissing the complaint herein, together with the costs and disbursements of this action.

Dated, February , 1961.

ASHE & RIFKIN  
Attorneys for Defendant  
Local 802  
305 Broadway  
New York 7, N. Y.

By DAVID I. ASHE  
A Member of the Firm

**Answer of Defendant Federation in 60 Civil 4926**

(Tr. pp. 3641-3650)

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

---

**[SAME TITLE]**

---

Defendants American Federation of Musicians of the United States and Canada, and Herman D. Kenin, as President, Stanley Ballard, as Secretary and George V. Clancy, as Treasurer, answering the complaint herein, by Ashe & Rifkin, their attorneys, allege:

1. Deny each and every allegation set forth in paragraphs "1", "16", "17", "20", "22", "26", "27", "28", "29", "30", "31", "32", "33", "34", "35", "36", "37", "38", "39", "40", "41", "42", "43" and "44" of the complaint.
2. Admit that plaintiff Joseph Carroll is a member in good standing of defendants Local 802 and the American Federation of Musicians of the United States and Canada (hereinafter called the "Federation"), and, except as so admitted, deny knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraph "2" of the complaint.
3. Deny knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraphs "3", "4", "15" and "19" of the complaint.
4. Admit that the defendant Federation is a labor union, affiliated with the AFL-CIO, having its principal office at 425 Park Avenue, New York 22, N. Y.; and that it is an international union, consisting of numerous local unions

including defendant Local 802; and, except as so admitted, deny each and every allegation set forth in paragraph "5" of the complaint.

5. Admit that defendant Local 802 is a labor union; that it is affiliated with defendant Federation; and that its principal office is located at 261 West 52nd Street, New York 19, N.Y.; and, except as so admitted, deny each and every allegation set forth in paragraph "6" of the complaint.

6. Admit that the various local unions affiliated with the Federation have their principal offices in various parts of the United States and Canada; that its membership exceeds a total of 260,000 musicians throughout the United States, in Canada, in Puerto Rico and in the Virgin Islands, and consists of performers on musical instruments, including conductors, arrangers and copyists; and, except as so admitted, deny each and every allegation set forth in paragraph "7" of the complaint.

7. Admit, upon information and belief, that defendant Local 802 has about 30,000 members, including plaintiff Carroll; and except as so admitted, deny each and every allegation set forth in paragraph "18" of the complaint.

8. Admit that the defendants Federation and Local 802 admit orchestra conductors or leaders to membership; and, except as so admitted, deny each and every allegation set forth in paragraph "21" of the complaint.

9. Admit that the defendants Federation and Local 802 are labor organizations; and, except as so admitted, deny each and every allegation set forth in paragraph "23" of the complaint.

10. Admit that the Constitutions and By-Laws of the Federation and of Local 802 constitute contracts between the said Unions and their respective memberships; and,

except as so admitted, deny each and every allegation set forth in paragraph "24" of the complaint.

11. Admit that the individual plaintiffs have refused to comply with the provisions of the new minimum wage scales and the minimum number of musicians to perform on various types of engagements, but allege further that the said plaintiffs have for many years complied with previous minima which were established in the same manner and under the same procedures as were employed in establishing the new minima; and, except as so admitted and alleged, deny each and every allegation set forth in paragraph "25" of the complaint.

**AS AND FOR A FIRST COMPLETE DEFENSE:**

12. Plaintiffs, defendant Federation and defendant Local 802 are engaged in the same industry, trade, craft or occupation, to wit, the musical entertainment industry, and at least one of the plaintiffs is a member of the said Federation and Local 802, both of which are organizations of employees.

13. A controversy concerning terms or conditions of employment and concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment exists between plaintiffs and the Federation and Local 802 arising out of plaintiffs' claims that they are "employers" and that terms or conditions of employment are being imposed upon them by their "employees" through the aforesaid labor unions without bargaining or agreement.

14. By reason of the foregoing, this action involves and grows out of a labor dispute as defined in Section 13 of the Norris-La Guardia Act (29 USCA, Sections 101-115), and pursuant to the provisions of the said Act this Court does not have jurisdiction to issue the injunction sought by plaintiffs herein.



**AS AND FOR A SECOND COMPLETE DEFENSE:**

15. The defendants Federation of Musicians and Local 802 are labor unions, and as such represent their members in connection with the rendition of labor by such members in the performance of musical services.

16. The labor of the said members in the performance of musical services is not a commodity or article of commerce, and the Federation and Local 802, in carrying on the activities of which plaintiffs complain, are pursuing legitimate labor union objectives in the self-interest of their members by establishing minimum scales and other minimum conditions of employment for said members.

17. By reason of the foregoing, the acts of which plaintiffs complain are immunized from injunctive restraint under the Sherman Act (15 USCA, Sections 1 and 2) by the provisions of the Clayton Act (15 USCA, Section 17; 29 USCA, Section 52).

**AS AND FOR A THIRD COMPLETE DEFENSE:**

18. Repeat and reiterate each and every allegation set forth in paragraphs "12" and "13" of this answer as if herein more fully and at length set forth.

19. The primary and exclusive jurisdiction to determine the issues of whether the individual plaintiffs are employers and whether defendants are required to bargain collectively with them is vested in the National Labor Relations Board under the National Labor Relations Act as amended (29 USC, Ch. 7).

20. Plaintiffs, recognizing the said jurisdiction of the National Labor Relations Board, on or about March 14, 1960 filed a charge with the said Board against defendant Local 802 (NLRB Case No. 2-CB-2855), alleging that Local 802 was engaging in unfair labor practices within the meaning of Section 8(b)(1) and (3) of the said National Labor Relations Act, in that plaintiffs were employers and Local

802 was refusing to bargain collectively with them as to one part of the aforesaid "price list". The National Labor Relations Board's Regional Director, after a thorough investigation of the facts, refused to issue a complaint "because there is insufficient evidence of any violation of the Act", and, on an appeal taken by plaintiffs, the said ruling was upheld by the Board's General Counsel.

21. In April 1961, the plaintiffs, further recognizing the said jurisdiction of the National Labor Relations Board, filed five separate unfair labor practice charges with the said Board against one or both of the defendant Unions, which charges present the same basic issues of law and fact as are presented in this action, and the said charges are still pending before the said Board.

22. By reason of the foregoing, this Court is pre-empted from jurisdiction to determine the subject matter of this action.

#### AS AND FOR A FOURTH COMPLETE DEFENSE:

23. The performance of a single musical engagement by plaintiffs or by any other members of the defendant Unions, no matter where performed, is a purely local affair and does not constitute interstate commerce within the meaning of Sections 1 and 2 of the aforesaid Sherman Act.

24. By reason of the foregoing, the acts complained of by plaintiffs cannot and do not constitute violations of the said Sherman Act, and this Court is without jurisdiction over the subject matter of this action.

#### AS AND FOR A FIFTH COMPLETE DEFENSE:

25. Upon information and belief, the "General Scale Increase for Special Class Club Dates", as set forth in Exhibit "A" annexed to the complaint, are a list of minimum wage scales at which members of defendant Local 802 are ready and willing to perform labor, and that such wage

scales were established, and have been established for more than forty (40) years, by the members of Local 802 themselves.

26. Upon information and belief, the individual plaintiffs had been members of the defendant Unions for more than fifteen years and throughout the said period they accepted the aforesaid minimum wage scales and working conditions and the manner in which they were established and applied.

27. By reason of the foregoing, plaintiffs have been guilty of laches which debar them for any equitable relief such as they seek in this action.

AS AND FOR A SIXTH COMPLETE DEFENSE:

28. Repeat and reiterate each and every allegation set forth in paragraph "25" of this answer, as if herein more fully and at length set forth.

29. The pattern under which defendant Unions operate with respect to single engagements has been set for so many years that the issuance of an injunction at this time would cause more harm to defendant Unions and their thousands of members than it would benefit plaintiffs.

30. By reason of the foregoing, plaintiffs are not entitled to any equitable relief.

AS AND FOR A SEVENTH COMPLETE DEFENSE:

31. Repeat and reiterate each and every allegation set forth in paragraphs "2" and "10" of this answer as if herein more fully and at length set forth.

32. At all times mentioned in the complaint herein, the By-Laws of the American Federation of Musicians have provided and still provide, in Article 8, Sections 1 and 2:

"Section 1. An appeal can be made to The International Executive Board from any decision, of whatever kind, of a Local or any other authority. A

further appeal can be made to a Convention in any case involving an ultimate fine of \$500.00 or more, or expulsion from membership in the Federation, regardless of whether the original decision was made by a Local or by the International Executive Board.

"Section 2. In the event of an appeal to the International Executive Board or to a Convention the appellant may request a stay of judgment from the International President, who shall decide whether or not the appellant is entitled to same."

33. The foregoing provisions of the By-Laws of the American Federation of Musicians have provided and still provide ample and complete remedies for the alleged grievances of the individual plaintiffs who are members of defendant Unions which constitute the basis of their complaint herein.

34. The said individual plaintiffs have not taken or attempted to take the aforesaid appeals as provided in the said By-Laws.

35. By reason of the foregoing, the said individual plaintiffs have instituted and still prosecute this action without having first exhausted the means of redress provided by the said By-Laws of defendant American Federation of Musicians, and they are, therefore, not entitled to any of the relief sought by them in this action.

AS AND FOR AN EIGHTH COMPLETE DEFENSE AS  
AGAINST PLAINTIFF ASSOCIATION:

36. Plaintiffs Orchestra Leaders of Greater New York, and Charles Turecamo and Joseph Carroll as Treasurer and Secretary thereof have not alleged in the complaint herein that the said plaintiffs in the said capacities have been injured in their business or property by any of the acts alleged to have been committed by defendants, and

the said plaintiffs in the said capacities have not in fact been so injured.

37. By reason of the foregoing, the said plaintiffs have no standing to institute this action under the provisions of the Sherman Act, and are not entitled to the relief sought by them herein.

AS AND FOR A NINTH COMPLETE DEFENSE:

38. Plaintiffs cannot fairly insure the adequate representation of all members of the class for which they presume to bring this action, nor does their complaint herein define the members of the said class who are alleged to be similarly situated as plaintiffs or that the said alleged class does not include persons of hostile, antagonistic or differing interests.

39. By reason of the foregoing, no class action is authorized herein by Rule 23 of the Federal Rules of Civil Procedure.

WHEREFORE, defendant Federation respectfully prays for judgment dismissing the complaint herein, together with the costs and disbursements of this action.

Dated: May 12, 1961.

ASHE & RIFKIN,  
Attorneys for  
Defendant Federation,  
305 Broadway,  
New York 7, N. Y.,  
By DAVID I. ASHE,  
A Member of the Firm.



**Plaintiffs' Requests for Admissions**

(Tr. pp. 473-487)

[SAME TITLE.]

Plaintiffs request defendants, within thirty (30) days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

I. That the following documents, exhibited with this request, are genuine and are accurately reproduced herewith at the pages indicated:

1. Letter dated January 27, 1960, reproduced in "Appendix to Appellant's Brief", copy of which is supplied herewith (hereinafter called simply "Appendix"), pp. 22a-25a.
2. Plaintiffs' telegram to Herman D. Kenin dated February 9, 1960, reproduced in Appendix, p. 11a, paragraph 17.
3. Letter of Godfrey P. Schmidt to Herman D. Kenin dated February 19, 1960; reproduced in Appendix, pp. 30a-32a.
4. Letter of Herman D. Kenin dated February 19, 1960, reproduced in Appendix, p. 12a, paragraph 18.
5. Letter of Kenin to Schmidt, reproduced in Appendix, p. 12a, paragraph 19.
6. Regulations, reproduced as "Exhibit C" in Appendix, p. 21a.
7. Page 28 of "Allegro", dated June, 1960, copy of which is supplied herewith; it having been referred to in Appendix, p. 43a, paragraph 30, as "Exhibit H".
8. "Exhibit D", reproduced in Appendix, pp. 142a-144a.
9. "Exhibit E", reproduced in Appendix, pp. 144a-145a.

10. "Exhibit F", reproduced in Appendix, pp. 146a-147a.
11. "Exhibit H", reproduced in Appendix, pp. 147a-148a.
12. "Exhibit I", reproduced in Appendix, pp. 149a-164a.
13. "Exhibit M", reproduced in Appendix, p. 183a.
14. "Exhibit N", reproduced in Appendix, pp. 184a-185a.
15. "Exhibit O", reproduced in Appendix, p. 186a.
16. "Exhibit P", reproduced in Appendix, p. 187a.
17. "Exhibit Q", reproduced in Appendix, pp. 188a-189a.
18. "Exhibit R", reproduced in Appendix, pp. 190a-192a.
19. "Exhibit S", reproduced in Appendix, pp. 193a-194a.
20. "Exhibit T", reproduced in Appendix, pp. 195a-196a.
21. "Exhibit X", reproduced in Appendix, p. 199a.
22. "Exhibit Y", reproduced in Appendix, p. 200a.
23. "Exhibit Z", reproduced in Appendix, pp. 201a-202a.
24. Letter dated November 22, 1960, reproduced in Appendix, pp. 160a-161a.

H. That each of the following statements is true:

1. That no other provision (excepting those listed in paragraphs of the complaint in Civil 1169-60 numbered 10, 11, & 13) was made for the involved Welfare Fund by Local 802, its members or officers; (Appendix, p. 9a) and that no further amendments to the By-Laws and Price List had been enacted to the time of the service of complaint in 60 Civil 1169; and that, as alleged in paragraph 14 of the said complaint, no votes of the members at any regular or special meeting of Local 802 or of the Executive Board of Local 802 concerned the Welfare Fund in question until January 12, 1960.

2. That on January 12, 1960, about fifty (50) members of Local 802 in the single engagement field were present at

a meeting called by officers of Local 802 and conducted in the Executive Board Room of said local; that these members had been notified by telephone or word of mouth by various officers of Local 802 of the calling of such meeting; that those present at such meeting were informed by said officers that only about thirty-five (35) orchestra leaders had been asked to attend said meeting; and that no effort had been made at that time to organize a general meeting of orchestra leaders in the single engagement field who are members of Local 802, as alleged in paragraph 14 of the complaint in 60 Civil 1169 (Appendix, p. 9a).

3. That after publication of the "Allegro" dated January 1960, plaintiffs promptly requested defendants, Max Arons and Al Manuti, to withhold adoption of the Welfare Plan until it was worked out in detail; and that this request was denied by said defendants (Appendix, p. 11a).

4. That defendants have failed or refused to negotiate with plaintiffs, or with other orchestra leaders similarly situated, on behalf of sidemen, members of Local 802, represented by the union and employed in orchestras of plaintiffs or of orchestra leaders who are similarly situated.

5. That defendant, Local 802, purports to represent "sidemen" or musicians hired to perform in the bands or orchestras of plaintiffs and those similarly situated.

6. That plaintiffs as orchestra leaders, and other orchestra leaders who are members of Local 802, frequently fulfill single engagements outside of the State of New York.

7. That plaintiffs and the class they represent gross millions of dollars income per year from such engagements in various states of the United States in connection with which they render musical services outside of New York (and pay the 10% travelling surcharge) with the aid of sidemen represented by defendants; that many of the purchasers of such musical services are large corporations engaged in inter-state or foreign commerce; and that side-

men or musicians who play in the orchestras of plaintiffs or the class represented by plaintiffs derive each year hundreds of thousands of dollars in compensation from their rendering musical services in various states of the United States.

8. That defendants, pursuant to long standing union practice and policy, have insisted and do insist that orchestra leaders become and remain members in good standing of Local unions affiliated with defendants.

9. That one of the methods used by defendants to enforce their "prices" and "minimums" is the publication in "Allegro" of notices or advertisements similar to "Exhibits C, D, E, F, & G", annexed to the complaint (paragraph 30) in 60 Civil 2939 (Appendix, p. 43a).

10. That plaintiffs, as orchestra leaders, operate their several businesses independently; have their own usual and occasional clientele; employ sidemen or musicians for particular occasions; direct such sidemen or musicians themselves or assign directors for them; control and discipline the sidemen who perform in their orchestras; conduct all negotiations leading to engagements for their respective orchestras; regulate the style and manner of performance of their orchestras, musicians, who are members of defendant unions, and who assist them in carrying out their engagements; and that such engagements cannot be fulfilled without the assistance of such sidemen or musicians.

11. That the so-called "tax" referred in paragraph 29 of the complaint in 60 Civil 4025 is not and has not been regarded in the accounting and other records of defendants as part of the dues, initiation fees or assessments levied by defendants or any of them; and that said "tax" is imposed upon orchestra leaders (Appendix, p. 72a).

12. That the so-called travelling "surcharge" referred to in paragraph 30 of the complaint in 60 Civil 4025 is not and has not been regarded part of the initiation fees,

dues or assessments levied by defendants or any of them; and that said "surcharge" is imposed upon orchestra leaders (Appendix, p. 72a).

13. That as a matter of common union practice and policy, failure of plaintiffs (or any member of the class represented by the plaintiffs) to collect the aforesaid "tax" and "surcharge" or their failure to disburse them in the manner required by defendants exposed plaintiffs (and said class) to union discipline, charges and penalties.

14. That union discipline (pursuant to the defendants' practice, policy, constitutions and by-laws) may and sometimes does include economic reprisals, including the penalty of being denominated "unfair" or a "defaulter".

15. That plaintiffs and many members of the class represented by plaintiffs were, at the time of the institution of the four complaints reprinted in the "Appendix", members in good standing of defendant unions.

16. That the so-called "Price List" published by defendant, Local 802, fixes the prices which, in more than fifty per cent of the engagements in the single engagement field, are charged by orchestra leaders (members of Local 802) to their clients; that orchestra leaders expose themselves to union charges if they contract with their clients at prices below the prices appearing in said "Price List"; and that defendants impose upon plaintiffs and the class represented by plaintiffs wage scales, price lists and minimums without collective bargaining agreement.

17. That when orchestra leaders are expelled from membership in defendant labor organization, the latter publish in "Allegro" and by other means, news of such expulsion; and that, in that connection, they warn members of defendant labor organizations that such members will be subject to union charges and penalties if they perform engagements for such expelled orchestra leaders.



18. That defendants or local unions affiliated with defendants have, since institution of the four Civil Actions set forth in the "Appendix", filed charges against and in some cases imposed penalties on orchestra leaders because of their failure to comply with union regulations and practices challenged as illegal in the said four complaints; and that among these orchestra leaders were Ben Cutler, Joe Basile, Howard Lanin, Joseph Carroll, Charles Peterson and others.

19. That plaintiffs (and the class of orchestra leaders represented by plaintiffs) subject themselves to intra-union charges and penalties by failing to comply with the rules set forth in a booklet entitled "Single Engagement Minimums", which was annexed as "Exhibit J" to the joint affidavit of Joseph Carroll and Charles Peterson, sworn to on March 21, 1961, and reproduced in the "Appendix", pp. 117a-142a.

20. That as a result of interstate travel by orchestras or by side-men who play for plaintiffs and the class represented by plaintiffs, defendant, American Federation of Musicians, derives an income of three to four millions of dollars per year from the so-called "travelling surcharge".

21. That there was no union meeting or membership meeting and no prior notice to orchestra leaders concerning the promulgation of the prices published in "Allegro" for December 1960; and that the sudden use of the term "wages", or "wage scales" in that publication constituted a deviation from former practice of defendants who had theretofore exclusively used the words "prices" where the union now (since institution of plaintiffs' actions) uses "wages" or "wage scales".

22. That the new prices, wages or wage scales published in "Allegro" for December, 1960, were imposed upon the membership by decision of the officers or executive board of defendant, Local 802, without any action by its membership.

23. That paragraph #29, p. 134a, of the Appendix sets forth an accurate comparison between prices or wages required by defendant, Local 802, before and immediately after promulgation of the involved notice in an issue of "Allegro" and that the percentage of increase set forth in said paragraph #29 is accurate.

24. That orchestra leader Al Gentile of 21 Parkmore St., New Britain, Connecticut was expelled from membership in Local 285, affiliated with defendant, American Federation of Musicians of the United States and Canada, for failure to pay the ten percent "travelling surcharge" (pp. 138a-139a, paragraph 35(a) of the Appendix).

25. That orchestra leader Richard Petrycki of 3144 Lincoln Avenue, Oceanside, N.Y. was notified by defendant, Local 802, that upon motion made by the Executive Board of the Local, his membership in said Local had been terminated because of his failure to pay the two-percent "tax", whose legality is challenged in 60 Civil 4025.

26. That orchestra leader Eddy Dell (Dmuchowsky) of 137 Russell Street, Brooklyn, N. Y., was notified by defendant, American Federation of Musicians of the United States and Canada, that he was in default in payment of the ten percent "travelling surcharge" to Local 562, affiliated with said International Union; and that said International Organization imposed upon the said Eddy Dell a substantial fine and threatened the said Eddy Dell with expulsion from the American Federation of Musicians unless the fine and "tax" were paid by a certain date.

27. That defendant, Herman D. Kenin, telephoned to the President of Local 77, Mr. Musumeci, in the latter part of 1960, and stated the following as the opinion of Henry Kaiser, one of the attorneys for defendant, American Federation of Musicians of the United States and Canada: "Individual leaders who comply with the Schmidt opinion are to be told by the locals involved in the most explicit

terms that the Federation's laws are not subject to interpretation by anti-labor attorneys and said laws will be vigorously enforced"; and that this "opinion" of Mr. Kaiser applied to the ten percent "travelling surcharge" as well as to the so-called "tax" imposed by various locals affiliated with said International Organization with the latter's approval.

28. That defendants and their affiliated local unions comply with the following policy which has been exemplified on numerous occasions by defendant's practice: If, at any time, the evidence is conclusive to the International Organization that the contract for an engagement entered into by a member orchestra leader does not conform with the union prices or conditions, then the said International Organization (The American Federation of Musicians of the United States and Canada) orders or has the right, under union rules, to order, its members not to play such engagements; and that their refusal to comply with such Union order constitutes their resignation from membership in the Local Union to which they belong.

29. That whenever any person, persons, organization or establishment is declared to be on the national "unfair" or "defaulter" list by defendant, American Federation of Musicians of the United States and Canada, members of said International and of its affiliated unions may not (under union rules and practice) render service to such person, persons, organization or for or in such establishment.

30. That no member of defendant, American Federation of Musicians of the United States and Canada, or of any of its affiliated local unions is permitted by defendants to play with any suspended or expelled members or with non-members, unless it be with the consent of the Federation or; in cases wherein the laws of the Federation otherwise provide; and that such consent is often or generally refused.

31. That no orchestra leader or orchestra comprising members of the defendant, International Organization, is permitted by defendants to render services (for any function in any jurisdiction) with non-members without the permission of the involved local executive board or duly authorized official of said local; and that such permission is often or generally refused.

32. That ordinarily no person is permitted by defendants to use any kind of musical instrument or device in the rendition of musical service for an orchestra leader (member of defendant union) unless he or she holds a membership card in the American Federation of Musicians or in one of its affiliated locals.

33. That orchestra leaders and sidemen who are members of defendant, American Federation of Musicians, are not permitted by defendants to sign any form of contract or agreement other than the type issued by defendant American Federation of Musicians or one of its Locals; and that the penalty for violation of this union rule or practice is a fine of not less than one hundred (100) dollars.

34. That no member of defendant, American Federation of Musicians, is permitted by defendants' rules and practice to accept an engagement to join a travelling band or orchestra from a non-member; and that no member of said Federation is permitted by defendants' rules and practice to negotiate with a non-member for such engagement.

35. That orchestra leaders or bands, playing travelling or miscellaneous, out-of-town engagements, are not permitted by defendants' rules or practice to employ any person except a member in good standing of the Federation; and that a fine of five hundred (500) dollars may be imposed upon any member for violation of this union rule.

36. That all contracts of any character or nature for the rendition of musical services are, pursuant to defendants' rules and practices, subject to all existing and future

provisions of the Constitution, By-Laws and Regulations of defendant, American Federation of Musicians of the United States and Canada.

37. That sidemen who are members of defendant labor unions, regardless of the provisions in their contract of employment, are prevented or may be prevented according to defendants' "laws" and practices from rendering service under such contract by reason of any ban, unfair list, order or requirement of defendant, American Federation of Musicians of the United States and Canada.

38. That the price named in all contracts for the employment of orchestras signed by orchestra leaders with their clients must at least be that of the Local or Federation as the case be, having jurisdiction under defendants' rules and practice.

39. That defendants make binding union provisions or regulations for the minimum prices which must be charged by orchestra leaders to their clients for travelling theatrical engagements.

40. That it is regarded by defendants as a violation of union rules and as detrimental to the welfare of defendant labor unions for a member whether leader or sidemen to perform in or with a band or orchestra advertised under, or which bears the name of, a non-member without the consent of the executive board; and that such consent is often or generally refused.

41. That it is regarded by defendants as a violation of union rules and as detrimental to the welfare labor unions for a member to engage or assist in engaging or to advise or permit anyone else to engage or assist in engaging any musician who is not a member of a local affiliated with defendants.

42. That it is regarded by defendant as a violation of union rules and as detrimental to the welfare of defendant



labor unions for a member to accept engagement from any musician who is not a member of a local affiliated with defendant, American Federation of Musicians of the United States and Canada.

43. That it is regarded by defendants as a violation of union rules and as detrimental to the welfare of defendant labor unions for any member to engage or perform with a member who is not in good standing with a local affiliated with defendant, American Federation of Musicians of the United States and Canada.

44. The defendants regard orchestra leaders as responsible for the good standing of each and every member in the employ of such orchestra leaders.

45. That no engagement or employment as an orchestra leader is regarded by defendants as effective or as properly recognized by any member of defendant unions unless it is first approved by the executive board having jurisdiction.

46. That defendants regard orchestra leaders as "personnel managers" and not as employers.

47. That while defendants have constantly refused to allow plaintiffs (or the class of orchestra leaders represented by plaintiffs) to engage or to work with non-members, defendants tolerated or permitted numerous bands to participate in the Labor Day Parade for 1961 without objection to their status as non-members; and they tolerated or permitted union members to play with non-members in many individual bands which participated in said Parade.

48. That defendants, by union practice and regulation, regularly limit the right of orchestra leaders to discipline sidemen by insisting that defendant unions alone have the right to make final decisions respecting enforcement of discipline in their orchestras.

49. The defendants do not permit impartial outside arbitration in the single engagement field; that they insist on

processing grievances presented by sidemen and by orchestra leaders before union tribunals, which purport to have the sole right to make final decisions on such matters; and said tribunals often draw up charges, investigate them, hear evidence on such charges and make decision on them.

50. That with approval of defendant, American Federation of Musicians, local unions affiliated with its unilaterally exercise the power to invalidate or modify contracts between orchestra leaders and clients by raising the prices therein specified for orchestra engagements; and that thereafter (as for example in the Philadelphia Local #77) for all similar engagements, the raised prices must, by union "law", be inserted in such contracts.

#### **Defendants' Answers to Request for Admissions**

[SAME TITLE.]

The request of plaintiffs for admissions pursuant to Rule 36 of the Federal Rules of Civil Procedure contains certain items which relate to both the defendant American Federation of Musicians (hereinafter called the "Federation") and the defendant Associated Musicians of Greater New York Local 802 (hereinafter called "Local 802") while others relate only to one or the other of these defendants. Accordingly, where one of the defendants has not answered a specific item, it is not an admission of the item on its part, but is due to the fact that the inquiry was directed to the answering defendant.

Upon information and belief, defendants respond as follows to plaintiffs' request:

1. As to items I-1, 2, 3, 4 and 5 of said request, defendant Federation admits that the copies of documents furnished by plaintiffs with said request are true copies of the originals thereof.

2. As to items I-6, 7, 9, 10, 11, 13, 14, 15, 17 and 20 of said request, defendant Local 802 admits that the copies of documents furnished by plaintiffs with said request are true copies of the originals thereof.

2a. As to items I-18, 19, 21, 22 and 23 of said request, the defendants admit that the copies of documents furnished by plaintiffs with said request are true copies of the originals thereof.

3. As to item I-8 of said request, defendant Local 802 denies that the copy of charges against Charles Peterson, dated February 20, 1961, furnished by plaintiffs with said request is a true copy of the original thereof.

4. As to item I-12 of said request, defendants cannot truthfully admit or deny the genuineness of the document referred to because such document purports to be a transcript of a trial proceeding conducted by a union which is not a party to this case. Defendants also state that whether or not such document is genuine, it is inadmissible in evidence because such proceeding was conducted by a union concerning a person neither of whom is a party to these actions.

5. As to item I-16 of said request, defendants cannot truthfully admit or deny the genuineness of the document referred to because defendants lack knowledge or information sufficient to form a belief as to whether or not such document was sent to and received by plaintiff Peterson. Defendants also state that whether or not such document is genuine, it is inadmissible in evidence because it is irrelevant, immaterial and incompetent.

6. As to item I-24 of said request, defendants cannot truthfully admit or deny the genuineness of the document referred to because defendants lack knowledge or information sufficient to form a belief as to whether or not such document was sent by plaintiffs' attorney, Godfrey P. Schmidt, Esq. Defendants also state that whether or not

such document is genuine, it is inadmissible in evidence because such document was sent by and to persons not parties to these actions.

7. As to item II(1) of said request, defendant Local 802 denies said statement.

8. As to item II(2) of said request, defendant Local 802 denies said statement.

9. As to item II(3) of said request, defendant Local 802 admits said statement.

10. As to item II(4) of said request, defendants deny that they have refused to negotiate with plaintiffs. Defendants also deny so much of said statement which states or implies that sidemen are employed by plaintiffs or by other orchestra leaders.

11. As to item II(5) of said request, defendants deny so much of said statement which states or implies that sidemen are employed by plaintiffs or by other orchestra leaders.

12. As to item II(6) of said request, defendants deny said statement.

13. As to item II(7) of said request, defendants deny said statement.

14. As to item II(8) of said request, defendants deny that they have insisted and do insist that orchestra leaders become and remain members in good standing of Local unions affiliated with defendants except when such membership is permitted by applicable law.

15. As to item II(9) of said request, defendant Local 802 denies said statement.

16. As to item II(10) of said request, defendants deny so much of said statement which states or implies that sidemen or musicians are employed by plaintiffs, and which

states or implies that plaintiffs direct, control and discipline sidemen or musicians or regulate the style and manner of performance, other than in the capacity of orchestra conductors. Because defendants lack knowledge or information sufficient to form a belief thereof, defendants cannot truthfully admit or deny so much of the statement which states that plaintiffs, as orchestra leaders, operate their several businesses independently; conduct all negotiations leading to engagements; have their own usual and occasional clientele.

17. As to item II(11) of said request, defendant Local 802 denies that the said "tax" is not and has not been regarded as part of the dues, initiation fees or assessments of said defendant.

18. As to item II(12) of said request, defendants deny that said "surcharge" is not and has not been regarded as part of the dues, initiation fees or assessments of defendant unions.

19. As to item II(13) of said request, defendants deny that plaintiffs represent members of a class.

20. As to item II(14) of said request, defendants admit only so much of said statement which states that union discipline (pursuant to defendants' practice, policy, constitutions and by-laws) may and sometimes does include being denominated "unfair" or a "defaulter", and defendants deny the remainder of said statement.

21. As to item II(15) of said request, defendants deny that plaintiffs represent members of a class.

22. As to item II(16) of said request, defendant Local 802 denies said statement.

23. As to item II(17) of said request, defendant Local 802 denies so much of said statement which states or implies that sidemen are employed by plaintiffs or by other orchestra leaders.



24. As to item II(18) of said request, defendants state that whether or not said statement is true, so much thereof as relates to actions taken by persons and unions who are not parties to these cases is inadmissible because of irrelevancy.

25. As to item II(19) of said request, defendants deny that plaintiffs represent members of a class.

26. As to item II(20) of said request, defendant Federation denies said statement.

27. As to item II(21) of said request, defendant Local 802 denies so much of the statement as states that there was no prior notice to orchestra leaders concerning the promulgation of the prices published in the December, 1960, issue of "Allegro", that the use of the terms "wages" or "wage scales" was sudden, and that the defendants had theretofore exclusively used the word "prices" where the union now uses "wages" or "wage scales".

28. As to item II(22) of said request, defendant Local 802 denies said statement.

29. As to item II(23) of said request, defendant Local 802 denies said statement.

30. As to item II(24) of said request, defendant Federation denies said statement. Defendants also state that whether or not said statement is true, it is inadmissible in evidence because it is irrelevant since it relates to a person not a party to these actions.

31. As to item II(25) of said request, defendant Local 802 denies said statement.

32. As to item II(26) of said request, defendants state that whether or not said statement is true, it is inadmissible in evidence because it relates to a person not a party to these actions.

33. As to item II(27) of said request, defendant Federation denies said statement. Defendants also state that whether or not said statement is true, it is inadmissible in evidence because it is irrelevant, immaterial and incompetent.

34. As to item II(28) of said request, defendants deny said statement.

35. As to item II(29) of said request, defendants deny the truth of the statement except in situations where permitted by applicable laws.

36. As to item II(30) of said request, defendants deny the truth of the statement except in situations where permitted by applicable laws.

37. As to item II(31) of said request, defendants deny the truth of the statement except in situations where permitted by applicable laws.

38. As to item II(32) of said request, defendants deny the truth of the statements except in situations where permitted by applicable laws.

39. As to item II(33) of said request, defendants deny said statement.

40. As to item II(34) of said request, defendants deny the truth of the statement except in situations where permitted by applicable laws.

41. As to item II(35) of said request, defendants deny the truth of the statement except in situations permitted by applicable laws.

42. As to item II(36) of said request, defendants deny the statement.

43. As to item II(37) of said request, defendants deny the statement except in situations permitted by applicable laws.

44. As to item II(38) of said request, defendants deny so much of the statement as states or implies that employers of orchestras are not employers of the leaders, musicians and sidemen in said orchestra.

45. As to item II(39) of said request, defendants deny so much of the statement as states or implies that employers of orchestras are not employers of leaders, musicians and sidemen in said orchestras. Defendants also state that whether or not such statement is true, it is inadmissible in evidence because it is irrelevant.

46. As to item II(40) of said request, defendants deny the statement except in situations permitted by applicable law.

47. As to item II(41) of said request, defendants deny the statement except in situations permitted by applicable law. Defendants also deny so much of said statement as states or implies that leaders or musicians employ other musicians in performing musical services.

48. As to item II(42) of said request, defendants deny the statement except in situations permitted by applicable law. Defendants also deny so much of said statement as states or implies that leaders or musicians employ other musicians in performing musical services.

49. As to item II(43) of said request, defendants deny the statement except in situations permitted by applicable law. Defendants also deny so much of said statement as states or implies that leaders or musicians employ other musicians in performing musical services.

50. As to item II(44) of said request, defendants deny the statement.

51. As to item II(45) of said request, defendants deny said statement.

51a. As to item II(46) of said request, defendants admit said statement.

52. As to item II(47) of said request, defendants deny that plaintiffs represent a class, and so much of said statement as states or implies that plaintiffs employ musicians and sidemen.

53. As to item II(48) of said statement, defendants deny the statement.

54. As to item II(49) defendants deny so much of said statement as states or implies that defendants' grievance processing procedures are not impartial.

55. As to item II(50) of said statement, defendants deny said statement.

Dated, New York, N.Y.

January 9th, 1962.

(Verified.)

ASHE & RIFKIN,  
Attorneys for Defendants,  
305 Broadway,  
New York 7, N. Y.

### Plaintiffs' Exhibit 388

6. Defendants do not permit orchestra leaders (who are Union members) the discretion to decide whether the services of such orchestra leaders and their orchestras may be rendered *gratis* for a particular client, for the sake of *charity* or for the sake of *prestige* of the orchestra leader and his orchestra or for any other reason. The orchestra leader *must* charge the *minimum* "price of the engagement."

3. Defendants deny the statements contained in paragraph 6 of the request, except admit that under the provisions of the constitution and by-laws of defendant unions, in the absence of waiver by the Executive Board of the

unions, the purchaser of the music must pay to members of Local 802 not less than applicable minimum wages.

13. An orchestra leader like Carroll, Cutler or Peterson, who belong to defendant unions and who is asked by a client to quote the price for an engagement, must include the following items which together constitute the minimum "price of an engagement":

A. The *rate for the engagement* as classified by defendant unions in *Class A* or *Special Class* as defined in the Local 802 Minimum Book (formerly the Minimum Book defined three classes: A, B, and C).

B. The *minimum number of musicians* required by defendants for the particular room or place of the engagement as also fixed in the Local 802 Minimum Book.

C. The *minimum scale of wages* for the sidemen involved as determined in defendants' Price List. This scale varies according to the following factors also defined in said Price List or in By-laws:

- (1) The *type of the engagement*.
- (2) The *number of hours* of playing required by the client (overtime rates).
- (3) Whether the *sideman doubles*, i.e., whether he plays more than one instrument.
- (4) Whether the engagement is for *continuous* or *non-continuous* playing.
- (5) Whether there are to be *rehearsals* or not.
- (6) Whether there is to be a *show lasting more than 20 minutes*.

D. The *minimum "leader's fee"* or "leader money."

E. The *minimum mileage fees* or charges fixed by defendants.



F. The 8% *price addendum* (formerly 7%) required by the Price List for the leaders' social security expenses.

G. Minimum *cartage charges*, where there is cartage.

H. The *cost of uniforms*, where uniforms are required.

I. The *cost of transportation*, where there is transportation.

J. The *cost of food and lodging*, where required.

K. The 10% *traveling surcharge* where the engagement is played outside of the home local's jurisdiction.

4. Defendants deny the statements contained in paragraph 13 of the request, except admit that members of the Federation, when asked by a purchaser to quote the cost of the music to the purchaser for an engagement in Local 802's jurisdiction, must quote a minimum sum which must be based upon the factors set forth in sub-paragraphs A, B, C, E, G, I, J and K of paragraph 13 plus the minimum wages payable to the leaders plus 8% of the minimum wages to cover social security expenses.

19. The International Executive Board of AFM exercises supervision over the Price Lists of all of its locals; and it has the right, if it finds that the Price List in force in any Local is detrimental to any other locals of the Federation, to adjust the objectionable provisions of said Price List.

5. Defendants deny the statements contained in paragraph 19 of the request, except admit that the by-laws of the Federation provide as follows (Art. 1, § 5-P):

"The Board shall exercise a supervision over the price list of all Locals, and upon finding that the price list in force in any Local is detrimental to other Locals of the Federation, it shall be empowered to adjust the objectionable sections of said price list."

Defendants further admit that the International Executive Board, on rare occasions, has exercised such supervision over the price lists of locals of the Federation.

20. The local secretary of each AFM local regularly sends to each local secretary within a radius of 100 miles a local Price List of general business, and minimum book, if any.

6. Defendants deny the statements contained in paragraph 20, except admit that the Secretary of Local 802 periodically sends to each local secretary located within a radius of 100 miles of Columbus Circle, New York City, N. Y., a Price List and Minimum Book.

25. The *Allegro* for March, 1960, printed the proposals of amendment of the Price List to be submitted to the annual Price List meeting of Monday, April 18, 1960, 3:00 P.M. at Palm Gardens. No quorum gathered at that Price List Meeting. As a result, action was taken by the Executive Board on the proposed Price List resolutions. *Allegro* for May, 1960, printed the action taken by the Executive Board on Price List resolutions.

8. Defendants admit the statements contained in paragraph 25 of the request.

48. Traveling orchestras which establish headquarters in the jurisdiction of any local are not permitted to compete for or accept and play engagements in said jurisdiction.

11. Defendants deny the statements contained in paragraph 48 of the request, except admit that the by-laws of the Federation provide that members of traveling orchestras which play engagements at hotels, cafes, inns, clubs, dance halls, etc., and which establish headquarters in the jurisdiction of any local, in which they are not members, are not permitted to accept engagements in that jurisdiction (Art. 17, § 23).

53. A traveling band engaged in a summer resort is restricted by defendants to services for such summer resort

only. Such services may not include the playing of theatrical engagements, picnics or any other miscellaneous engagements, unless the local in whose jurisdiction the engagement is played gives its consent, and such consent is rarely given.

13. Defendants deny the statements contained in paragraph 53 of the request, except admit that Article 17 of the by-laws of the Federation provides:

[Entire (13 line) quote omitted from original.]

63. Defendants permit no competition for engagements between orchestra leaders at prices below the minimum "prices of engagements" fixed in the said Price Lists and/or other Union "laws".

14. Defendants deny the statements contained in paragraph 63 of the request, except admit that under the by-laws of defendants, the purchaser of the music must pay not less than the applicable minimum wages to the members of Local 802 engaged.

66. Under defendants' rules and practice, no orchestra leader is permitted (nor is his agent permitted) to solicit a future engagement at a hotel, nightclub or other steady engagement where another orchestra leader (and his band) is engaged unless the latter has received a notice of termination of his engagement; and orchestra leaders who solicit in violation of this rule are subject to Union charges and discipline.

15. Defendants deny the statements contained in paragraph 66 of the request, except admit that the by-laws of Local 802 prohibit its members from soliciting "any steady engagement for any place where the orchestra or members then employed have not received proper notice terminating their engagement" (Art. IV, § 1(z)).

85. An orchestra leader must, before an engagement is played, inform the local in whose jurisdiction the engage-

ment is played, of the amount collected for transportation charges and of the point from which the transportation charges are made, and the exact and correct amount of percentage which will be paid to an agent, or agents as compensation for booking the engagement. He must also notify the local secretary of the termination of the engagement, the use of the option, or voiding of the option on the contract. If any engagement of a traveling orchestra is postponed or cancelled, the leader or the booker must notify the local immediately.

17. Defendants deny the statements contained in paragraph 85 of the request, except admit that the Federation's by-laws contain reporting requirements similar to those referred to in paragraph 85 of the request for traveling engagements played by its members in hotels, cafes, inns, clubs, dance halls, and the like (Art. 17, § 2).

90. Annexed hereto, marked EXHIBIT "E" to form part of this document is a communication addressed by AFM to all AFM Booking agents.

## EXHIBIT "E"

AMERICAN FEDERATION OF MUSICIANS  
OF THE UNITED STATES AND CANADA

Affiliated with the A.F.L.-C.I.O.

Office of the President  
425 Park Avenue  
New York 22, N. Y.

July 12, 1962

To All A.F.M. Licensed Booking Agents:

Dear Sirs:

We refer to the License Agreement between you and us pursuant to which you act as booking agent for members of the American Federation of Musicians.

The International Executive Board of the Federation has approved amendment of that agreement by the addition of new paragraphs NINTH and TENTH the text of which is enclosed. The present paragraphs NINTH and TENTH will be renumbered as paragraphs ELEVENTH and TWELFTH.

You are requested immediately to sign and return the enclosed letter to us in the enclosed self-addressed envelope, which will constitute an amendment to your License Agreement effective as of July 1, 1962.

Sincerely yours,

HERMAN KENIN  
*President*

HDK:  
Enc.



July 12, 1962

American Federation of Musicians  
425 Park Avenue  
New York, N. Y.

Dear Sirs:

We refer to the License Agreement between you and us pursuant to which we act as booking agent for members of the American Federation of Musicians.

We agree to the amendment of said License Agreement effective July 1, 1962, as follows:

The following is hereby added thereto as paragraphs NINTH and TENTH:

"NINTH: (A) Every claim by a Licensee against a member of the Federation shall be submitted for determination as provided in Article 9 of the Federation's By-Laws.

(B) No claim based on an event occurring before June 30, 1962, shall be enforceable unless submitted for such determination by January 1, 1963, except as provided in (D) or (E) below.

(C) No claim based on an event occurring on or after June 30, 1962, shall be enforceable unless submitted for such determination within two (2) years following such event, except as provided in (D) or (E) below.

(D) The written acknowledgment of any claim dated and signed by the member against whom such claim is asserted shall extend the time in which such claim may be submitted for determination for a period of two (2) years following the date of such acknowledgment.

(E) The delivery of a statement of account to the member and the failure of the member to object

thereto within the time therein prescribed, as provided in Tenth below, shall extend the time in which any claim specified in such statement of account may be submitted for determination for a period of two (2) years following the date of mailing of such statement of account.

**Tenth:** The statement of account referred to in Ninth (E) above shall comply with all of the following requirements:

(A) Such statement of account shall be rendered to the member at least once in each twelve (12) months period either during the term of the agreement between the Licensee and the member, or since January 1, 1962.

(B) Such statement of account shall be in reasonable form and detail sufficient to inform the recipient of (i) each receipt by Licensee in connection with performances by the member since the date of the last such statement and the places and dates of such performances; (ii) each disbursement made by the Licensee to or on behalf of the member, including commissions retained by the Licensee, since the date of the last such statement; and (iii) the net amount owed by the Licensee to the member or by the member to the Licensee as of the date of such statement.

(C) Such statement of account shall be deemed to have been duly delivered, if mailed by certified or registered mail, return receipt requested, addressed to the member at the address last filed by such member with Licensee.

(D) Such statement of account shall state prominently that objection to any item therein contained shall be made in writing within a stated time which, in no event, shall be less than sixty (60) days following the date of mailing such statement.

(E) Copies of such statements of account shall be filed with the Office of the President of the Federation concurrently with the delivery thereof to the member."

The presently numbered paragraphs NINTH and TENTH of said agreement are renumbered ELEVENTH and TWELFTH.

Very truly yours,

\_\_\_\_\_  
Name of Booking Agent

By \_\_\_\_\_  
Authorized Officer

\_\_\_\_\_  
Address

18. Defendants admit the statements contained in paragraph 90 of the request.

94. AFM refuses to issue licenses or permits to Bookers, Agents, Representatives and Managers of orchestras or bands (such as those of Carroll, Cutler and Peterson) unless the AFM form of license is executed by such persons.

19. Defendants deny the statements contained in paragraph 94 of the request, except admit that Federation refuses to issue licenses or permits to bookers, agents, representatives and managers of orchestras or bands unless Federation's form of license is executed by such persons.

110. Orchestra leaders like Cutler, Carroll and Peterson are forbidden, once they cease being members in good standing in defendant Unions, from playing their own instruments and from conducting or otherwise participating in the activities of their own orchestras, as is their professional custom and essential asset; and defendants enforce this policy by making Union sidemen unavailable to orchestra leaders as soon as they lose such good standing.

21. Defendants deny the statements contained in paragraph 110 of the request, except admit that under the by-laws of defendant unions, no member of defendant unions is permitted to perform services with a non-member unless approval of either or both of the defendant unions is given (Federation by-laws, Art. 13, § 5; Local 802 by-laws, Art. IV, § 1 (v)).

121. All contracts between orchestra leaders and their clients must comply with the By-laws and other regulations, including Price Lists and Minimums requirements of defendant Unions; otherwise such contracts will not be approved by defendant Unions.

23. Defendants deny the statements contained in paragraph 121 of the request, except admit that contracts between purchasers of music and orchestra leaders who are members of the defendant unions must comply with the constitution and by-laws and regulations of defendant unions.

122. Every agreement or contract relating to performance of musical services by an AFM member is required by defendants to include a provision reading:

"If any \* \* \* grievance [which is defined as every claim, controversy, dispute or difference, arising out of or relating to the interpretation or application of the contract] involves or relates to booking agents, traveling bands, recording, radio, or television activities, or any other matter within the sole competence of the Federation, pursuant to its constitution, bylaws, rules or resolutions, as distinguished from matters within the competence of the local thereof, it shall be adjudicated and determined only by the International Executive Board of said Federation \* \* \*".

24. Defendants deny the statements contained in paragraph 122 of the request, except admit that under the Federation by-laws, every agreement or contract relating to

the performance of musical services by a Federation member is deemed to include the following provision (Art. 9, § 6):

“(A) Every claim, dispute, controversy or difference (all of which are herein called ‘grievance’) arising out of, dealing with, relating to, or affecting the interpretation or application of this contract or the violation or breach or threatened violation or breach thereof, whether between (1) an employee who is a member of the American Federation of Musicians (herein called ‘Federation’) and the employer or purchaser of services hereunder, (2) such member and the booking agent of the engagement provided for hereunder, (3) such employer or purchaser and such booking agent, or (4) two or more booking agents shall be heard, adjudicated and determined as follows:

“(1) If any such grievance involves or relates to booking agents, traveling bands, recording, radio or television activities, or any other matter within the sole competence of the Federation pursuant to its Constitution, Bylaws, rules or resolutions, or distinguished from matters within the competence of the locals thereof, it shall be adjudicated and determined only by the International Executive Board of said Federation (herein called ‘Board’).

“(2) Any other such grievance shall be initially adjudicated by the person, persons or body specified by the rules, Bylaws or practices of the Local of said Federation in whose jurisdiction the services have been or are to be performed, in accordance with the procedures adopted in such rules or By-laws or adhered to under such practices. Any party to such local adjudication may appeal from determination thereof to the Board within thirty days from the date on which such party is notified of such local determination or



within such additional time as the President of the Federation or the Board may specify. On such appeal, the Board shall receive the evidence taken by such local person, persons or body and, in its discretion, may receive additional evidence from any party. Pending such appeal, the President of the Federation may stay the award on such terms and conditions as may be deemed proper, including but not limited to the deposit of adequate security with the Federation.

“(3) The award of the Board on any grievance submitted to it in accordance herewith, whether in the first instance or on appeal from the decision of such local person, persons or body shall be final and binding upon all parties. The award of such local person, persons or body in any adjudication from which an appeal is not taken to the Board as above provided shall be final and binding upon all parties.”

125. Defendants now maintain such control over orchestra leaders who function as do Cutler, Carroll or Peterson, that they claim and exercise the right, under Unions “laws”, to require such orchestra leaders to produce for Union inspection, records of all engagements contracted or performed by orchestra leaders together with listings of all personnel and all payments for such engagements including total contract price, wages and expenses.

25. Defendants deny the statements contained in paragraph 125 of the request, except admit that defendant unions may require their members to produce for their inspection, records of engagements contracted for or performed by such union members, together with a listing and names of sidemen, the payment by the purchaser of the music for engagements, and the wages paid to each of the musicians performing the engagement.

148. Defendant Unions require from orchestra leaders who wish to make recordings of the performances of their orchestras, an AFM license to make such recordings.

26. Defendants deny the statements contained in paragraph 148 of the request, except admit that in the vast majority of cases orchestra leaders who are members of defendant unions and who desire to make their own recordings of the performances of their orchestras, are required by Federation to procure a Federation phonograph record agreement to make the recording.

151. The By-laws (Edition as of October 23, 1962) of Local 802 impose on all orchestra leaders and their clients minimum prices of engagements in the following pages and paragraphs, all taken from Article IV of said By-laws:

- (a) p. 37 par. "(k)"
- (b) p. 38 par. "(n)"
- (c) p. 38 par. "(o)"
- (d) p. 38 par. "(p)"
- (e) p. 39 par. "(t)"
- (f) p. 39 par. "(u)"

27. Defendants deny the statements contained in paragraph 151 of the request, except admit that, in the absence of waiver by the Executive Board of the unions, members of Local 802 must receive not less than the applicable minimum wage for an engagement; and further admit that the by-laws of Local 802 contain the provisions cited in said paragraph 151.

157. The Local 802 Price Lists apply worldwide, wherever members of that Local comprise the orchestra. They also apply when orchestras of other AFM Locals play within the jurisdiction of Local 802, as do the Local 802 minimum-number-of-musicians regulations.

29. Defendants deny the statements contained in paragraph 157 of the request, except admit that all orchestras composed of members of the Federation, who perform services within the jurisdiction of Local 802, must comply with the minimum wage and minimum number of men requirements of Local 802.

156. Included in the minimum union price of the engagement is the minimum income or compensation which, under union rules, the orchestra leader must derive from the engagement. This minimum income or compensation includes the leader's fee and the 8% surcharge. Here are some examples of such minimum leader's income or compensation for orchestra comprising *six* musicians, playing on a non-continuous basis:

<i>Sundays &amp; Weekdays</i>	<i>Saturdays (nights)</i>
\$53.76 for 1-3 hours (dinner music only—no dancing)	\$81.92 for 1-4 hours
\$71.68 for 4 hours	
\$89.60 for 5 hours	\$102.40 for 5 hours
\$107.52 for 6 hours	\$122.88 for 6 hours

Here are examples of minimum leaders income or compensation enforced by defendants, for orchestras comprising *twelve* musicians on a non-continuous basis:

<i>Sundays &amp; Weekdays</i>	<i>Saturdays (nights)</i>
\$63.84 for 1-3 hours (dinner music only—no dancing)	\$97.28 for 1-4 hours
\$85.12 for 4 hours	
\$106.40 for 5 hours	\$121.60 for 5 hours
\$127.68 for 6 hours	\$145.92 for 6 hours

An orchestra leader, member of defendant unions, would be subject to union charges if he agreed with his client to forego any part of the income or compensation listed above.

28. Defendants deny the statements contained in paragraph 156 of the request, except admit that defendant unions prohibit their members (including leaders) from rendering musical services at wages below those established by defendant unions; that the amounts set forth in paragraph 156 of the request constitute the wage scale of

orchestra leaders who are members of Local 802 for the times and under the circumstances specified, and that a member of Local 802 would be subject to charges if he waived any part of said wages.

167. Under A.F.M. pricing and minimums policy and practice in New York City, the minimum price of a dinner engagement (no dancing) in the main ballroom of the following hotels must be computed upon the basis of an orchestra whose size is at least 50% of the number appearing alongside the name of the hotel:

Astor—12	Roosevelt—10
Biltmore—10	St. George, Brooklyn—12
Commodore—12	St. Regis Roof—8
Essex House—8	Savoy Hilton—6
Park Lane—7	Sheraton East—10
Pierre—10	Statler Hilton—12
Plaza—10	Waldorf-Astoria—12

In all other hotels in New York City, no minimum is fixed for use of the main ballroom for any dinner engagement (no dancing).

30. Defendants deny the statements in paragraph 167 of the request, except defendant Local 802 admits that the minimum wages for its members for dinner engagements (no dancing) in the main ballroom of the hotels referred to must be computed upon the basis of an orchestra whose size is at least fifty percent of the number appearing alongside the name of the hotels referred to in said paragraph 167; and that in all other hotels in New York City no minimum is fixed for use of the main ballroom for dinner engagements (no dancing).

State of New York }  
 County of New York } ss.:

Max L. Arons, being duly sworn, deposes and says:

That he is Secretary of defendant Associated Musicians of Greater New York, Local 802 ("Local 802") of the defendant American Federation of Musicians of the United States and Canada ("Federation"); that he is one of the defendants herein; that Local 802 and the Federation and various officers of Local 802 and the Federation are the defendants in this action; that all of the defendants are united in interest and are answering together those provisions of plaintiffs' request for admissions dated March 15, 1963 which defendants have been required to answer; that this verification is made on behalf of all of the defendants; that he has read the foregoing answer to the requests for admissions ("the answer") and knows the contents thereof; that he is acquainted with the facts upon which the answer is based; that the answer, upon information and belief, is true.

MAX L. ARONS

Sworn to before me September 12, 1963.

HERBERT D. SCHWARTZMAN

---

**Excerpts from Deposition of Alfred J. Manuti, President of Local 802, Taken February 1, 1962 (Plaintiffs' Exhibit 386)**

[p. 114] Q. I refer to Item No. 8 there on the same page. Isn't it true, Mr. Manuti, that your union does insist that orchestra leaders become and remain members in good standing if they are to have members of your union play for them as sidemen? A. Yes, sir.

Q. If an orchestra leader charges his client less than the amount set forth in the price list, he violates your union by-laws, does he not? A. If he charges less than our minimum rates, he [p. 115] would be in violation of our by-laws.



Q. What does your union do to enforce obedience to your by-laws with respect to minimums and prices? A. I don't grasp your question.

Q. If an orchestra leader fails to employ the minimum number of employees which your book requires or if he fails to charge at least the minimum rates fixed in your price list, is he brought up on charges for that? A. He would be subject to charges, sure.

Q. And if he is found guilty, how is he usually treated or what are the alternatives of treatment? A. The trial board would then find him guilty and prescribe any penalties that they felt were justified from the evidence brought before them.

[p. 115] Q. And the penalties are those penalties that are set forth in either the by-laws of the Federation or the by-laws of the local? A. Our penalties are not listed in our by-laws or the Federation by-laws. As I say, there could be a fine; there could be a reprimand; there could be an expulsion; there could be a suspension; there could be various alternatives.

[p. 116] Q. Isn't it also true that if an orchestra leader persists in disobedience of the minimum rules and your price list rules that his name is published eventually in Allegro?

Mr. Ashe: Published how?

A. No.

Q. His name is never published as one who is expelled? A. If he is expelled.

Q. In other words, the publication only takes place once he is expelled? A. Yes. This is to forewarn our members that they could not perform with them.

[p. 122] Q. The question was: What procedure does your union follow in denominating someone as unfair or as a defaulter? A. Well, if we have a contract with a purchaser and he hasn't complied with that contract, he hasn't paid our leader or, in turn, of course, he hasn't paid our men, we would consider him to be unfair and then take whatever action we deem necessary. In some cases we would sue

him in court. The only time he would appear on our unfair list or the national unfair list [p. 122] would be—and it doesn't pertain to what we are discussing here, single engagements; it's a steady engagement. If a steady engagement defaulted, we would put him on the unfair list.

Q. Is there any distinction between the unfair list or the defaulter list, or is that the same thing? A. Same thing.

Q. Does it ever happen that former union members or union members are put on that list or is this only applied to third parties? A. In the main I believe they are third parties.

Q. Isn't it true that whenever a person is declared to be on the national unfair list or defaulter list members are not permitted to render any services to that person? [p. 123] A. To that establishment?

Q. Yes. A. That's true.

Q. Is it true that no member of the American Federation of Musicians or of your local or any local is permitted to play with a suspended or expelled member or non-member unless the Federation itself gives consent? A. That's true.

Q. Does the Federation, according to your experience, regularly give that consent? A. I am not aware of that, no.

Q. And isn't it true that no orchestra leader and no orchestra comprising members of your local, for example, is permitted to render services with non-members without the permission of the executive board of your local? A. That's true.

[p. 123] Q. Does your local executive board regularly give such consent? A. The only time we may consent to our sidemen performing with a non-member is if some outstanding conductor from Europe, who is here on a visa and who is going to do a couple of concerts. We would not make him a member of our local or the Federation. We allow our members to perform with him as a guest conductor.

[p. 124] Q. Isn't it true that no person is ordinarily permitted by your union to use any kind of a musical instru-

ment or device in an orchestra or for an orchestra leader unless he holds a membership card with your union or one of the affiliated unions? A. What device?

Q. I am talking about musical instruments. A. Musical instruments, yes, he would not be able to.

Q. Isn't it true, too, that the Federation does not permit a traveling band or orchestra leader for a travelling band to engage a non-member? A. That's true.

Q. And it is true, too, isn't it, that an orchestra leader or a band which plays miscellaneous out-of-town engagements is not permitted to employ any person except [p. 125] a person in good standing with the Federation? A. That's true.

Q. And it is true, is it not, that all contracts of any character or nature for the rendition of musical services which come within the jurisdiction of the International or the local are subject to all existing and future provisions of your constitution and by-laws? A. Yes.

Q. Your local regards it as a violation of your local rules and as detrimental to the welfare of your union for a member, whether he is an orchestra leader or a sideman, to perform with a band or an orchestra which is advertised under the name of a non-member; isn't that right? A. That's right.

[p. 126] Q. Your union also regards it as a union offense and detrimental to the union for a member to assist in engaging or advise or permit anyone to engage a person who is not a member of one of the unions affiliated with the International; isn't that correct? A. This could be a violation, yes.

[p. 127] Q. Is it true that your union practice and your union regulations makes the orchestra leader responsible for the good standing of every member in his orchestra? A. Yes, sir.

Q. What does that exactly mean? A. Well, he must ascertain whether or not each member that he employs is in good standing with his union.

Q. In other words, all he has to do is check the card to see if the man is a member of the union? A. Right.

Q. Yes. Maybe I ought to frame it this way: Is it true that no engagement of an orchestra leader is regarded as effective unless it is first approved by your board? A. According to our by-laws, yes, that's true.

[p. 128] Q. How does that work, Mr. Manuti? Does that mean that every time an orchestra leader is engaged in the single engagement field your executive board passes on it? A. No, sir.

Q. How does it work, then? A. Well, if he reports the job to the union or he files a contract with the union, we pretty well know who our leaders are. He is supposed to have his card number on the contract when he files it or on his report. We know who the people are, and for us to go through this—I mean you can understand how much work it would take for an executive board to approve each and every contract.

Q. That's why I asked the question. A. Our department checks that through.

Q. If in a particular case you find that the man is not recognized by you as an orchestra leader, what happens? A. Well, in that case I am sure that the department would check it out or check him further and find out whether or not he is a member.

Q. And if he were not a member, what procedure, if any, would your union follow? A. We wouldn't accept his contract.

Q. Suppose he attempted to play the engagement [p. 129] anyway? A. Well, you would have to play without musicians and sidemen, because our sidemen wouldn't be able to perform with them. Our business agent would be on the job.

Q. In other words, your business agent would advise the sidemen in some way? A. That's right, that he is not in good standing and they cannot perform with him and subject themselves to charges.

Q. That advice given by your business agent to the sidemen, is that given by mail or is that given orally? A.

Usually orally, because I said we have a supervisor for each borough, and each supervisor has delegates working under him. Now, he would receive instructions from his supervisor to go on this job, where we received this contract, and ascertain that he is not a leader—rather, he is not a member of the union and when our delegate shows up on the job, because we have no way of knowing who this person engaged as sidemen, the only way we would know this is on the job itself. The delegate would tell these men that they could not perform with this leader.

Q. So that normally the time when that advice would be given would be at the time when the engagement is to be played? A. Yes, sir.

[p. 132] Q. If a man enters into—if an orchestra leader enters into a contract to supply an orchestra at a given rate, that is to say, the rates that prevail at a particular time but the engagement is to be played at a future date when new and advanced rates apply, which rates [p. 133] applies to that engagement? The old rate or the new rate?

A. When we increase the rates, it is usually at a price list meeting prior to that meeting taking place. There are usually lots of resolutions presented, some of them dealing with increase in rates. At that period, prior to that meeting, you will find that the leaders will come in droves to submit their contracts, because they have a signed agreement for engagements that are going to take place at a later date, beyond the price list meeting. In order to get under the wire and get the advantage of the old rates, they submit all these contracts. We approve those contracts. Now, under our by-laws, a new wage rate doesn't become law until 14 days after it is printed in our official journal, or sometimes we set a date when these new scales will go into effect.

If we approve these contracts prior to this date, then we recognize that contract and we allow our members to perform under that agreement because we don't believe it will be fair to the purchaser that he made a contract for



a certain rate and then go to him in the middle of his contract and say to him, "You have to raise it."

Q. That never happens? A. No, sir.

[p. 134] Q. Do you recall one at which you told these orchestra leaders that you couldn't help the orchestra leaders, the union couldn't help the orchestra leaders on their tax problem because there might be a union involvement under the Sherman Anti-Trust Act? A. I didn't say that, no. What I did say was that these leaders who are pressing at that time, some of the leaders, a few leaders, were pressing at that time to be recognized as employers and I told them we could not recognize them as employers or negotiate contracts with them because we would be in violation of anti-trust. We couldn't maintain a union composed of employers and employees fixing prices.

[p. 135] So I said, "We don't recognize the leaders as employers. You are a member of this union." The employers, as far as we are concerned in the single engagement field is the person who actually pays the bill. That is our position.

Q. And it is your position that the orchestra leaders were personnel managers? Isn't that the word you used in your price list? A. That is what the price list says. That "personnel manager" has been used even prior to my becoming president. That was changed from contractor to personnel manager.

[p. 162] Q. Did the question of including employers and employees in your union come up at that meeting? A. It could have very well come up, yes.

Q. Do you recall that it did or is your memory— A. I have stated this several times.

Q. Stated what several times? A. This business of having employers and employees belonging to the same union and being in violation of the anti-trust laws if we did that, I said this individually to members, I have said this at—this was an unofficial meeting and there were 400 people. I must have just stated, but I have been stating right along what I believe the law is.

---

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

60 Civil 2939  
60 Civil 4926

JOSEPH CARROLL, ET AL., *Plaintiffs,*

- AGAINST -

AMERICAN FEDERATION OF MUSICIANS OF THE  
UNITED STATES AND CANADA, ET AL., *Defendants.*

**Pre-Trial Order**

*On June 17 and July 1, 1964, the parties to this action or their attorneys appeared before the Court at a pre-trial conference pursuant to Local Calendar Rules 6 and 13 and Rule 16 of the Federal Rules of Civil Procedure, and the following action was taken:*

1. The pleadings were agreed to be deemed amended in accordance with the framing of the issues in this action in paragraph 9 of this pre-trial order.

2. The parties agreed that the trial of this action shall be based upon this order and upon the pleadings as amended, except that defendants expressly abandon the "Seventh Complete Defense" set forth in their answers relating to the failure of the individual plaintiffs to exhaust reasonable intra-union remedies.

3. (a) The parties stipulated that the following facts are not in dispute in this action, each party reserving the right to object to the materiality of any such stipulated fact and its relevancy to the issues):

(1) Plaintiffs Joseph Carroll, Charles Peterson, Ben Cutler, Marty Levitt and Dan Terry, at all times relevant herein, were and are orchestra leaders and at the commencement of these actions were members of defendants

American Federation of Musicians of the United States and Canada ("Federation") and Associated Musicians of Greater New York, Local 802 ("Local 802"). Neither Carroll, Peterson nor Terry is presently a member of defendant unions.

(2) Local 802 has over 30,000 members. They perform musical services as conductors, instrumentalists, arrangers and copyists. Local 802 represents, and has traditionally represented, among others, members who are orchestra leaders, subleaders and sidemen, and has collective bargaining agreements with various employers.

(3) Defendants Al Manuti, Max L. Arons and Hi Jaffe as President, Secretary and Treasurer, respectively, of defendant Local 802.

(4) Membership in a local affiliated with Federation implies membership in the Federation.

(5) Defendant Federation is a labor union affiliated with the AFL-CIO and it is comprised of 683 local unions (including defendant Local 802) located throughout the United States and Canada.

(6) Defendant Federation has over 260,000 members, who perform musical services as conductors, instrumentalists, arrangers and copyists. The Federation represents, and has traditionally represented, among others, members who are orchestra leaders, subleaders and sidemen, and has collective bargaining agreements with various employers.

(7) Defendants Herman D. Kenin, Stanley Ballard and George V. Clancy are President, Secretary and Treasurer, respectively, of the defendant Federation.

(8) A single engagement is defined in the Bylaws of defendant Local 802 and is a musical performance generally for one night, but always for less than one week, including, but not limited to, such types of functions as weddings,

commencements, debutante parties, fashion shows, sports events, college or high school dances or other social events. All other engagements are steady engagements.

(9) All members of Local 802 are entitled to have their names included in the directory of membership of Local 802 under whatever category they choose. Each of the individual plaintiffs, while a member of the union, was included in the directory as an instrumentalist. For example, Cutler is listed under the heading "saxophone", and Carroll is listed under the heading "drums".

(10) The vast majority of members of defendant unions who act as orchestra leaders do not devote their full time to the profession of orchestra leader. They also serve as sidemen; they maintain no office: they do not employ steady or part-time employees; they do not advertise; they do not use the same sidemen from one engagement to another; they do not use subleaders; they do not call for rehearsals or train their orchestras; and they do not furnish music, bandstands or uniforms. They are musicians who may lead today and may follow tomorrow.

(11) Conducting is a musical service and orchestra leaders, when conducting, perform the same type of work, whether they are "employers" (for any purpose) or "employees".

(12) Orchestra leaders have traditionally (for at least sixty-five years) been members of defendant unions and their predecessors.

(13) Almost without exception, all members of defendant unions who are now orchestra leaders (including the individual plaintiffs herein) were sidesmen at the time of joining defendant unions and remained sidemen for a number of years thereafter.

(14) Local 802's "Price List" Booklet requires each sideman to be paid minimum wages for single or steady engage-

ments. Their wages are based upon a number of factors, including the type of engagement involved; the number of hours played; whether the sideman plays more than one instrument; whether playing is continuous or non-continuous; whether the musician has to transport certain bulky instruments; whether the musician is required to furnish an organ or music folios; whether the musician is required to rehearse; whether there is a show lasting more than twenty minutes; and whether uniforms (other than tuxedos) must be furnished by the musicians.

(15) On May 17, 1960, Local 802 adopted a resolution which increased the minimum wages payable to musicians for club dates. The recitals contained in the resolution were as follows:

"WHEREAS, There has been no general increase in Club Date Scale since 1955, and

"WHEREAS, High living costs impose an ever-increasing hardship on musicians who depend exclusively on Club Dates for a living, and

WHEREAS, Workers in other branches of the Catering business have recently received wage increases, and

"WHEREAS, Purchasers of music can afford an increase since music remains a relatively small part of the total party budget, and is indispensable for a successful affair, and

"WHEREAS, Leaders guarantee of additional fees, as provided by union rule, as well as the prerogative of booking in volume and/or over-scale, affords ample earning potential on Club Dates, therefore \* \* \*"

(16) On October 27, 1960, the Executive Board of Local 802 adopted a resolution increasing the rates of "Special Class Club Dates."

(17) Local 802's "Price List" Booklet requires each leader to receive certain minimum compensation for the



services rendered by him. *Thus*, Rule 1 of the Price List Booklet provides as follow

“RULE 1. ‘Regulations for Establishing Leaders’ Fees in Single Engagements Unless Otherwise Provided For.’”

“A. An engagement played by one member shall charge in addition to the Union Scale of the engagement 25 percent additional as Leader (Personnel Manager) fee.

“B. An engagement played by two members shall charge in addition to the Union Scale of the engagement 50 per cent additional as (Personnel Manager) fee.

“C. An engagement played by three members shall charge in addition to the Union Scale for the engagement 75 per cent additional as (Personnel Manager) fee.

“D. Where four or more men are employed the Leader shall charge and receive double the regular scale, i.e., 100 per cent additional as Leader (Personnel Manager) fee.”

(18) Similarly, Local 802’s “Price List” provides as to steady engagements:

“RULE 10. On all steady engagements the Leader (Personnel Manager) shall charge 25 per cent additional when only one (1) man is employed, 50 per cent additional when two (2) men are employed, 75 per cent additional when three (3) men are employed, and for all engagements of four (4) men or more he shall charge double the price per man, except where otherwise provided.”

(19) The almost undeviating practice for at least 65 years, both for single and steady engagements has been

for orchestra leaders to receive as minimum compensation for their services double the wages of sideman. This practice also applies to the rendition of services by leaders in such diverse areas as television, radio, phonograph recordings, motion pictures, symphony orchestras, night clubs, hotels, opera companies and theatres.

(20) In practically every area of musical entertainment, the leader receives as minimum compensation double the sidemen's minimum wages.

(21) Leaders also receive as part of their minimum compensation for single engagements a sum equal to 8% of the scale wages to be paid to the leader and sidemen on each engagement. The provision for such payment is contained in the "Price List" Booklet which provides as follows:

*"On every single engagement, in all classifications, the Leaders shall receive, in addition to his Leader money, a sum equal to seven (7) per cent of the total contract price, if it is at scale.*

*"In the event that the contract price is at least seven (7) percent above scale, the contract will be approved."*  
(Emphasis supplied)

The resolution which increased the 7% charge to 8% contains an identical provision.

(22) The reasons why orchestra leaders are required to receive the aforementioned additional sum of 7%, now 8%, of scale, are those set forth in the pamphlet issued by local 802 in December 1949, entitled "Your Federal Tax Liability". The pamphlet states as follows:

*"In order to protect the leader against any reduction in our price list because of the imposition of these [social security] taxes by the government, the Executive Board had amended the Price List on Single engagements to provide that on all single engagements, in all classifications, the leader shall receive, in addi-*

tion to his leader money, a sum equal to 7 per cent of the total contract price. The 7 per cent was computed by approximating the maximum tax liability at 5 per cent. The additional 2 per cent was added, first, to cover the leader's bookkeeping expenses, and secondly, to take account of the fact that he is liable for taxes on the total sum, which includes the additional 7 per cent Price List increase."

(23) In 1957 plaintiff Peterson submitted a "Proposed Price List Amendment", the effect of which would have required that all members of Local 802 acting as leaders secure a federal "Employers Number", and that failure by any such member to do so "shall be punishable by a fine not to exceed \$500.00 for the first offense." The first two recitals of that resolution stated:

"WHEREAS, Sub-Division number 2 of the rules governing single engagements provide that the leader must charge and receive, in addition to the union scale, a sum equal to cover (7) per cent of the total contract price and

"WHEREAS, the purpose of this regulation is to compensate the leader for the cost incurred in complying with Federal and State regulations calling for the payment of withholding taxes, social security, state disability, etc. \* \* \*"

(24) Local 802's "Price List" Booklet provides that the subleader shall receive the following as his minimum wage for single engagements:

"Rule 2. In the absence of the Leader (Personnel Manager), the member representing him for any part or all of the engagement shall receive one-half the extra charge made in conformity with Rule 1, unless otherwise provided.

"A. On all outside (Single) engagements, on which the orchestra is called upon to rehearse and/or play

a show and for which there is an extra charge. The Musician who actually conducts the rehearsal and/or show shall receive double the extra charge regardless as to who contracts the engagement, number of musicians employed or who stands in front of the orchestra."

(25) Similarly, in connection with steady engagements the "Price List" Booklet provides:

"Rule 11: In the absence of the Leader (Personnel Manager) the member representing him for all or part of the engagement shall receive one-half the extra charge made in conformity with Rule 1, unless otherwise provided."

(26) Thus, the subleader must receive as his minimum wages for conducting a four-piece band on a single engagement, one and one-half times the sideman's scale, or double the sideman's scale if rehearsal or show is involved.

(27) Local 802 not only establishes minimum compensation for sidemen and orchestra leaders on single and steady engagements, but also requires orchestra leaders to charge purchasers prices which are not less than the aggregate of the minimum compensation payable to sidemen and leaders.

(28) Provisions relating to the Travelling Surcharge have been part of Federation's By-Laws for upwards of thirty-five years.

(29) Section 8 of Recommendation No. 11, which was adopted by that Convention, provided that:

"8. Present provisions establishing minimum wages for traveling engagements at 10% in excess of applicable Local sales shall be reaffirmed."

(30) Defendant unions require their members to use a form of contract known as the "Form B Contract". Any

member failing to use the Form B contract is subject to penalty by defendant unions.

(31) The individual plaintiffs have heretofore used the Form B contract prescribed by defendant unions.

(32) Each of the individual plaintiffs claims to be a member of the National Association of Orchestra Leaders.

3. (b) It is plaintiffs' contention that defendants

(a) Fix the minimum *prices* of musical engagements, forbidding competition at prices below such minimum prices by establishing a minimum compensation or profit to be derived from musical engagements by orchestra-leader-employers; by establishing an 8% "surcharge" computed on the total price of the contract *at scale* (at least 50% of the musical engagements being priced at scale); by requiring in many instances a 10% price addendum in the form of the 10% "traveling surcharge"; by requiring the use of frequently increasing "minimums" (i.e., minimum quotas of sidemen) under arrangements whereby the orchestra-leader-employers' profits increased the more those minimums are increased in view of the required application of the 8% surcharge rule.

(b) Imposed unreasonable restraints on trade and restrictions on competition in the field of musical engagements by price-fixing as aforesaid; by including or compelling orchestra-leader-employers to refrain from competing with orchestra-leader-employers and with AFM licensed bookers for musical engagements at prices below defendants' minimum prices; by inducing or compelling bookers, agents, social secretaries, banquet managers, representatives and manager of union members, orchestras or bands, and owners or operators of hotels, night clubs and restaurants to avoid or to boycott orchestra-leader-employers who are not members of defendants; by inducing or compelling members of defendant union to refrain from assisting orchestra-leader-employers who are not members of defendant unions; by



inducing or compelling the owners or operators of facilities where music is played, as well as clients of orchestra-leader-employers (purchasers of music) to refrain from engagements or contracts for engagements with orchestra-leader-employers who are not AFM members or who have fallen into disfavor with defendants; by inducing or compelling orchestra-leader-employers to adopt defendants' standards for determining the needs of the public and the methods of meeting the needs of the public in the field of musical engagements; and by discriminatory pricing, fixed or arranged by AFM, based on the differences in Local jurisdictions.

(c) Impose unreasonable burdens on interstate commerce by enforcement of Article 15 of the AFM By-Laws with respect to "traveling surcharges"; by restrictive rules on traveling engagements played at hotels, cafes, clubs, dance halls, etc., as contained in Article 17 of the AFM By-Laws; by restrictive rules regarding military concerts and brass bands as contained in Article 26 of the AFM By-Laws; by restrictive rules for traveling theatrical engagements as contained in Articles 18 and 20 of the AFM By-Laws; by restrictive rules pertaining to records and transcriptions as contained in Article 24 of the AFM By-Laws; by restrictive rules pertaining to radio and television as contained in Article 23 of the AFM By-Laws; by restrictive transportation rules as contained in Article 19 of the AFM By-Laws; by restrictive rules pertaining to traveling concert orchestras as contained in Article 21 of the AFM By-Laws; and by restrictive rules pertaining to fairs, circuses, rodeos and carnivals as contained in Article 27 of the AFM By-Laws.

(d) Engage in monopolistic practices by inducing or coercing orchestra-leader-employers to become members of defendant unions in order to control them or with the effect of enabling defendants to exercise control over them; by inducing or compelling orchestra-leaders, sidemen and

owners or operators of facilities where music is played, to boycott orchestra-leader-employers who are not members of defendant union; by inducing or compelling booking agents, bookers, social secretaries, banquet managers, representatives and managers of union members, orchestras or bands to refrain from contracting with orchestra-leader-employers who are not members of defendant union; by preventing competition for musical engagements at prices below the minimum prices unilaterally fixed by defendants; by requiring approval of all contracts for musical engagements by the local having jurisdiction and in some cases by the AFM itself in circumstances where such approval is withheld unless the contract embodies the features, among others, denounced in the complaint as violations of the antitrust laws; by requiring all leaders and sidemen who are AFM members to insist on the inclusion, in their contracts, of the features required by Article 9 and 34 of the AFM By-Laws; by maintaining a system of licensing agents and representatives under Article 25 of the AFM By-Laws and by adjudicating or "arbitrating" claims under Article 9 of the said By-Laws; by barring free access into the business or profession of orchestra leaders where defendants' restrictive policies and practices are threatened or are not complied with by the involved orchestra-leaders; by insisting on the use of the false and fictional "Form B" contract; and by the coercions implicit in the use of defendants' Unfair, Defaulter and Forbidden Territory Lists under Article 10 of the AFM By-Laws; by assigning musical engagements to AFM leaders who are favorites of AFM officials; by apportioning musical engagements according to AFM rules; by regimentation of employers through AFM rules requiring reports, interrogations, trials, penalties and similar interferences.

The predatory practices of which plaintiffs complain are (1) interferences with their business and their clients; (2) impositions of wage scales unilaterally and without collective bargaining or discussion of any sort; (3) dis-

criminy treatment of orchestra-leader-employers; (4) retaliations and reprisals by use of AFM power and facilities; (5) attempts at blocking access to Courts; (6) interference with free speech and free assembly of members; (7) unlawful exactions; (8) failure of defendant unions to fulfill statutory definition of "labor organization"; (9) unilateral establishment of "minimums"; (10) regimentation of booking agents; (11) use of Form B contracts and other contractual provisions.

3. (c) It is the defendants' contention that:

(1) orchestra leaders are not employers; and (2) assuming, however, that orchestra leaders, such as the individual plaintiffs, are employers:

A. Orchestra leaders are in job and wage competition and have other economic interrelationships with other members of defendant unions who are employees. Accordingly, defendant unions have the right to represent orchestra leaders, whether or not employers, and to regulate the wages, hours, and other conditions of employment of all members of defendant unions, including orchestra leaders.

B. The acts complained of by plaintiffs in the complaints relate to a controversy concerning terms and conditions of employment, and concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms and conditions of employment. Such a controversy is a "labor dispute" within the meaning of the Norris-LaGuardia and Clayton Acts, and hence no injunction can be issued by this Court.

C. The acts complained of by plaintiffs do not constitute a contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states.

D. The acts complained of by plaintiffs do not constitute monopolization of or an attempt to monopolize, or a com-

bination or conspiracy to monopolize any part of the trade or commerce of the United States.

E. The acts complained of by plaintiffs only involve the labor of members of defendant unions in the performance of musical services, which is not a commodity or article of commerce.

F. The acts complained of by plaintiffs in the complaints are immunized from the prohibitions of the antitrust laws.

G. The issues raised by the complaints are within the exclusive primary jurisdiction of the National Labor Relations Board, and hence, pursuant to the provisions of the National Labor Relations Act, as amended, this Court lacks jurisdiction over the instant controversy.

H. The performance of music in the single engagement field is purely a local affair and does not constitute trade or commerce within the meaning of the Sherman and Clayton Acts.

I. Plaintiffs have not suffered any injuries sufficient to entitle them to equitable relief in this action.

J. Plaintiffs are in *pari delicto* with defendants as to any alleged violation of the antitrust laws and are thereby precluded from the equitable relief sought herein.

K. Plaintiff Orchestra Leaders of Greater New York ("OLGNY") is not an association; is not presently in existence; has not been injured or aggrieved by any of defendants' activities, and has no standing to bring the instant actions.

L. There is no class; plaintiffs do not insure the adequate representation of a class; and the class, if any exists, is not so numerous as to make it impractical to bring them all before the Court.

M. Plaintiffs Carroll, Peterson and Terry, who are no longer members of the defendant unions, are not injured

by any of the defendants' activities challenged by the complaints; are not threatened with injury by reason of any of the matters set forth in the complaints; and have no standing to sue.

N. Plaintiffs have been guilty of unclean hands in that they have misrepresented orders issued by this Court, and based upon such misrepresentation, have threatened defendants and their members with contempt proceedings and criminal prosecutions.

4. (a) The exhibits which plaintiff now expects to offer at the trial are the following:

1. The documents pertaining to the expulsion of Charles Peterson.
2. The documents pertaining to the expulsion of Joseph Carroll.
3. The reports filed by the AFM and by Local 802 with the Secretary of Labor under the Landrum-Griffin Act
4. The permits and other documents pertaining to the regulation by AFM of booking agents.
5. The Metropolitan Opera contract negotiated by Local 802.
6. The City Center Contract (New York City Ballet).
7. The League of New York Theatres Contract.
8. The AFM contract respecting TV and radio.
9. The AFM contract respecting TV and Video tapes.
10. The AFM contract respecting phonograph records.
11. The AFM contract respecting TV films.
12. The basic AFM agreement respecting motion pictures.
13. The basic AFM agreement respecting documentary films.



14. Notices in Allegro pertaining to recordings.
15. The Local 802 leaflet entitled: "Your Tax Liability".
16. Local 802 publications pertaining to its interstate involvement.
17. Allegro notice re "Special Class Club Dates".
18. Local 802 notices in Allegro respecting recordings.
19. Local 802's Executive Board's Statement of March 1965 respecting Price Lists.
20. Such additional documentation as may be necessary on rebuttal or cross-examination.
21. The documents pertaining to the attempted expulsion of Ben Cutler.
22. The basic AFM contract respecting Jingles.
23. The various documents listed in plaintiffs' Notice to Produce herewith submitted.

4. (b) Based upon the assumption that the issues herein are limited to the allegation of the complaints, the exhibits which defendants now expect to offer at the trial are:

(1) The transcript of testimony and the exhibits introduced at the trial of 60 Civil 1169 and 4025, which took place on March 5, 1962.

(2) The transcript of testimony of the plaintiffs herein, taken at the hearing on the motion for a preliminary injunction, dated July 20, 1962; in the Cutler action (62 Civ. 2252). In addition, defendants intend to introduce Exhibit 15 annexed to the affidavit in opposition to plaintiffs' motion for a preliminary injunction to the Cutler action.

(3) The following exhibits submitted by defendants in support of their motion for summary judgment herein, dated January 20, 1964:

A. Exhibit AT-A—November 1960 Issue of Allegro, page 7.

B. Exhibit AT-B—June 1960 Issue of Allegro, pages 15-16

C. Exhibit AT-C—Booklet Issued in 1895 by Musicians Mutual Protective Union

D. Exhibit AT-D—Schedule of Basic Hourly Rates in Various Fields of Musical Entertainment

E. Exhibits AT-F through AT-O, which consist of the following collective bargaining agreements between the Federation and Local 802 on the one hand, and various users of music on the other:

(1) AT-F—Agreement between the New York City Ballet and Local 802, dated March 1, 1962

(2) AT-G—Agreement between Metropolitan Opera Association, Inc. and Local 802, dated July 1, 1961

(3) AT-H—Form of Agreement between various restaurants and hotels and Local 802

(4) AT-I—Agreement between League of New York Theatres, Inc. and Local 802, dated September 6, 1960

(5) AT-J—Form of Agreement of the Federation relating to television video tape

(6) AT-K—Form of Agreement of Federation relating to television and radio commercial announcements

(7) AT-L—Form of Agreement of Federation relating to phonograph records

(8) AT-M—Form of Agreement of Federation relating to television film

(9) AT-N—Form of Agreement of Federation relating to independent motion pictures

(10) AT-O—Form of Agreement of Federation relating to ~~non-theatrical~~ documentary and industrial films.

F. Exhibit AT-P—Charges filed by plaintiffs with the National Labor Relations Board, and the disposition of those charges

G. Exhibit AT-Q—Charge filed with the National Labor Relations Board on or about January 9, 1964, by National Association of Orchestra Leaders

H. Exhibit AT-R—January 1960 Issue of Allegro, pages 10-11

I. Exhibit AT-S—Certification by the National Labor Relations Board of Federation as collective bargaining agent for musicians employed by Spartan Productions.

(4) The following exhibits which have not previously been referred to by defendants:

A. Allegro, January 1960, pages 10, 11 and 20

B. Allegro, March 1960, pages 3-5

C. Allegro, May 1960, page 2

D. Resolution 3 on page 4 of Defendants' Exhibit N

E. Price List Resolution, dated March 25, 1960, submitted by Ben Cutler to Local 802

F. Price List Resolution in 1957, submitted by Charles Peterson to Local 802

G. Price List Resolution, dated January 25, 1960, submitted by Charles Peterson to Local 802

H. Membership applications of Cutler, Carroll, Peterson, Levitt and Terry

I. The Constitution and By-Laws of (i) the Federation dated 1962, which contains the 1963 Amend-

ments, and (ii) Local 802, revised as of September 9, 1963

J. Letter from NAOL to Local 129, dated March 25, 1964

K. Letter from Ben Cutler to Local 444 of the Federation, dated February 4, 1964

L. Various letters from OLGNY, dated July 26 and 30, 1962, and August 9, and 16, 1962

M. The following letters from NAOL or OLGNY:

(1) Letter dated November 6, 1963, to Local 9

(2) Letter dated November 7, 1963, to Local 13

(3) Letter dated April 23, 1964, to Local 809

(4) Letter dated May 7, 1964, to George V. Clancy, Treasurer of the Federation

(5) Letters dated July 19, 1963, to Locals 9 and 402

(6) Letter dated March 12, 1964, to Local 836

N. The following letters from Godfrey P. Schmidt, Esq., attorney for plaintiffs:

(1) Letter dated February 13, 1963, to Local 563

(2) Letter dated August 16, 1963, to Local 334

4. (c) Should any party hereafter decide to offer additional exhibits, prompt notice of that fact shall be given to each other party and to the Court by serving and filing a supplemental pretrial memorandum. The supplemental pretrial memorandum may be in a short form statement filed with the deputy clerk for calendars unless served at trial, when it is to be filed with the trial judge. It shall set forth the reason why the exhibits were not theretofore identified in a pretrial memorandum.

4. (d) On or before September 30, 1964, the attorneys for all parties shall meet together at a convenient time and place, for the purpose of exchanging and examining all ex-

hibits, and shall furnish the other parties with a complete list of all exhibits to be introduced. Within ten days after such meeting, each of the parties shall file a supplemental pre-trial memorandum, wherein they shall state which exhibits of the other party are stipulated as being authentic. In such supplemental pre-trial memorandum, each party may reserve the right to object to the materiality or relevancy of each document preceded by the letter "A", and each party may reserve the right to object to all or a portion of each document preceded by the letter "B" on the ground that it is inadmissible under the hearsay rule.

5. (a) The witnesses whom plaintiffs now intend to call are the following:

Ben Cutler	Orchestra Leader
Joseph Carroll	" "
Charles Peterson	" "
Marvin Kurz	" "
Harry Lefcourt	" "
Marty Ames	" "
Stan Kenton	" "
Ralph Marterie	" "
Ruby Newman	" "
Meyer Davis	" "
Louis Ricardo	AFM Booking Agent
Neil Kirk	" " "
Tom O'Connell	" " "
Catherine Palmer	" " "
Willard Alexander	" " "
George Hamid	" " "
Charles Dixon	" " "
Joe Glazer	" " "
Daniel Hickey	Hotelman
Clyde Harris	"
Jack Egan	"
Joseph Binnse	"
John Perry	"
John McDonnell	"



Al Manuti	Union Official
Herman Kenin	" "
Matt Gillespie	" "
Emil Powell	" "
Jack Stauleup	" "
John Cipriano	" "
Max Arons	" "
Stanley Ballard	" "
Al Brown	" "
Sam Jack Kaufman	" "
James Marley	" "
Ted Diamond	Sideman
Al Gurten	" "
Charles McCarthy	" "
Murray Rothstein	" "
Lester Soloman	" "
Julius Schwartz	" "
Sam Bass	" "
Seymour Segal	N.Y.C. Official
Alfred Green	N.Y.S. Official
Marty Waters	Client (Purchaser of Music)
H. R. Jenkins	Recordings

5. (b) Based upon the assumption that the issues herein are limited to the allegation of the complaints and that no evidence will be permitted by this Court relating to such matters as booking agents; the alleged exercise by defendant unions of control over former members; procedures of defendant unions relating to arbitration; and the alleged misrepresentations by defendant unions of the legality of the Traveling Surcharge work tax and the Local 802 work tax, the witnesses which defendants now expect to call at the trial are:

Max L. Arons	261 West 52 Street, New York, N. Y.
William McCaffrey	261 West 52 Street, New York, N. Y.
Earl Shendell	261 West 52 Street, New York, N. Y.
Max Sontag	261 West 52 Street, New York, N. Y.

Stanley Ballard	220 Mt. Pleasant Avenue, Newark, N. J.
Guy Scola	220 Mt. Pleasant Avenue, Newark, N. J.
Robert Crothers	220 Mt. Pleasant Avenue, Newark, N. J.
Gilbert Rogers	425 Park Avenue, New York, N. Y.

5. (c) Should any party hereafter decide to call any additional witnesses, prompt notice of their identity shall be given to each other party and to the Court by serving and filing a supplemental pre-trial memorandum. The supplemental pre-trial memorandum may be in a short form statement filed with the deputy clerk for calendars unless served at trial, when it is to be filed with the trial judge. With regard to any additional witnesses to be called, after September 15, 1964, said supplemental pre-trial memorandum shall set forth the reason why the witness was not theretofore identified. No witness may be called at trial unless identified in a pre-trial memorandum.

6. There shall be no limit to the number of expert witnesses called by the parties.

7. Plaintiffs at this time expect to require twelve trial days; defendants at this time expect to require five trial days.

8. The issues to be tried as formulated by the Court are as follows:

(a) Are plaintiffs, and orchestra leaders who function as they do, employers and a non-labor group for the purpose of the antitrust laws?

(b) Is there a job and wage competition or other economic interrelationship between plaintiff-employer-orches-

tra-leaders on the one hand and on the other hand leaders and subleaders who are solely employees?

(c) Is there a job and wage competition on the one hand between leaders who play instruments and on the other hand sidemen who are employees and likewise play instruments?

(d) Did and do defendants fix the minimum prices of musical engagements in the single or steady engagement field in collaboration with employers as a non-labor group?

(e) Did and do defendants combine, arrange or conspire with employers as a non-labor group to fix minimum prices, to restrain trade or commerce, to unreasonably burden interstate commerce and to effectuate a monopoly in the area of musical services in the United States?

(f) Is the regulation by defendant unions of minimum compensation and working conditions of orchestra leaders substantially related to the preservation of wages and working conditions of other members of defendant unions who are employees?

(g) Do defendants induce or compel orchestra-leader-employers—

(1) To become and to remain members in good standing of the American Federation of Musicians?

(2) To refrain from competing for musical engagements with other orchestra-leader-employers at prices below the minimum prices fixed by defendants?

(h) Do defendants induce or compel orchestra-leader-employers, sidemen and the owners or operators of facilities where musical engagements are played to boycott or refuse to deal with orchestra-leader-employers who are not American Federation of Musicians members or who refuse to comply with American Federation of Musicians rules, regulations and practices alleged in the complaints?

(i) Do defendants enforce minimum prices, restraint of trade, monopoly and burdens on interstate commerce by:

(1) Requiring approval of all contracts for musical engagements?

(2) Requiring use of the "Form B" contract; and

(3) Requiring use of the contract provisions mandated by Article 34 of the American Federation of Musicians Constitution and Bylaws?

(j) Do defendants pursue with union penalties such as fines and expulsion and with union reprisals such as boycotting and black-listing members or expelled members who violate the aforesaid American Federation of Musicians regulations alleged in the complaints?

(k) Do defendants engage in practices as alleged in the complaints which prejudice purchasers of music and which tend to raise prices or otherwise control the market to the detriment of purchasers of music and defraud such purchasers of the advantages of free competition?

(l) Do the specific acts complained of by plaintiffs in the complaints relate to a controversy concerning terms and conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms and conditions of employment?

(m) Whether the issues raised by the complaints are within the exclusive primary jurisdiction of the National Labor Relations Board?

(n) Whether plaintiffs are in *pari delicto* with defendants as to any alleged violation of the antitrust laws and thereby precluded from the equitable relief sought herein?

(o) Whether the specific acts complained of by plaintiffs in the complaints constitute monopolization of or an attempt to monopolize or a combination or conspiracy to monopolize any part of the trade or commerce of the United States?

(p) Whether the performance of music in the single engagement field is purely a local affair and does not constitute trade or commerce within the meaning of the Sherman and Clayton Acts?

(q) Whether plaintiff Orchestra Leaders of Greater New York has any standing to sue as a plaintiff in this action or is a proper party plaintiff?

(r) Whether plaintiffs may bring the instant action as a class action?

(s) Whether the plaintiffs have been guilty of unclean hands so as to preclude the granting of any relief?

9. The case will be tried first solely on the issues of liability.

Dated: New York, New York  
August 12, 1964

So ORDERED:

.....  
U.S.D.J.

CONSENTED To:

.....  
*Attorney for Plaintiffs*

MCGOLDRICK, DANNETT, HOROWITZ & GOLUB

By .....  
*Attorneys for Defendants American  
Federation of Musicians of the  
United States and Canada, Herman  
D. Kenin, Stanley Ballard and  
George V. Clancy*

ASHE & RIFKIN

By .....  
*Attorneys for Defendants Associated  
Musicians of Greater New York,  
Local 802, Al Manuti, Max L.  
Arons and Hi Jaffe*



U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

CARROLL et al. v. AMERICAN FEDERATION OF MUSICIANS OF UNITED STATES AND CANADA et al., Nos. 60-2939 and 60-4926, May 17, 1965

LEVET, District Judge:—The plaintiff-orchestra leaders claim that the defendants American Federation of Musicians of the United States and Canada ("Federation of 'AFM'") and Associated Musicians of Greater New York Local 802 ("Local 802") have violated the antitrust laws. I have endeavored to categorize the multitude of alleged violations, making a sufficient number of Findings of Fact in each category to adequately define them. I have not found it either necessary or desirable to include every union regulation which might possibly be included in each category. The dispute in this case centers primarily on the applicable law and the interpretation to be given to the facts, rather than the facts themselves.

The court directed a consolidated trial in 60 Civil 2939 and 60 Civil 4926. The single set of Findings of Fact and Conclusions of Law relates to both actions.

Since the class suit was not sustained, this opinion relates exclusively to the plaintiffs in the action. Nevertheless, the court has found evidence presented as to other orchestra leaders who in certain respects are similarly situated to the plaintiffs relevant in making findings relating to some of plaintiffs' practices.

The parties stipulated that the testimony in 60 Civil 1169 and 60 Civil 4025 is part of the record in this case (1019-20). Consideration of damages was reserved for a time subsequent to the decision on liability.

This case having been tried, the court, after considering the pleadings, evidence, exhibits, briefs and stipulations of the parties and the proposed findings of fact and conclu-

sions of law, makes the Findings of Fact and Conclusions of Law listed below.<sup>1</sup>

### **Findings of Fact**

#### **I. THE PARTIES**

##### **A. Plaintiffs**

1. Plaintiffs Joseph Carroll, Charles Peterson, Ben Cutler and Marty Levitt, at all times relevant herein, were and are orchestra leaders, and at the commencement of these actions were members of defendants AFM and Local 802. Neither Carroll nor Peterson is presently a member of defendant unions (Stipulated Fact 1).

2. Plaintiffs Charles Turecamo and Dan Terry have withdrawn from the action.

3. At all times relevant herein, plaintiff Peterson was an employee of corporations known as Charles Peterson Theatrical Productions, Inc. ("Peterson, Inc.") and Carlton M. Hub, Inc. ("Hub, Inc."). Peterson was the sole stockholder of Peterson, Inc. and now controls Hub, Inc. (1755, 1983-84). Peterson always handled his musical engagements through Peterson, Inc. until recently when he began to use Hub, Inc. to (1756, 1983, 1986, Exs. GB, GG, GD).

4. Plaintiff Peterson was expelled from the defendant unions for various reasons, including his failure to abide by the union minimum wage scale (2117-18; Exs. FR-FY).

5. Plaintiff Carroll was expelled from Federation for failing to furnish Local 38 of the Federation with informa-

<sup>1</sup> References to "Stipulated Fact" are to those stipulated facts set forth in paragraph 3 of the pre-trial order herein. References to a number, "Ex." followed by a number, and "Ex." followed by a letter, are to the stenographer's minutes, plaintiffs' exhibits and defendants' exhibits, respectively. References to "St. Min." followed by a number are to pages in the stenographer's minutes of the trial of 60 Civil 1169 and 4025, which, pursuant to stipulation is part of the record in this action. "F.F." indicate Findings of Fact.

tion pertaining to an engagement which he performed in Westchester County. He was also expelled by Local 802 for violation of various of its By-Laws, including his failure to abide by Local 802's wage scales (Carroll v. Associated Musicians of Greater New York, Local 802, 52 LRRM 2950 [S.D.N.Y. 1963]).

6. There is no evidence that plaintiff Orchestra Leaders of Greater New York ("OLGNY") has in any way been damaged or aggrieved by any conduct of defendants or that it has any interest in these actions (see Stipulation of plaintiffs' counsel in letter to this court dated November 13, 1964).

7. Plaintiff Levitt performs services on club dates (577) and on steady engagements in hotels and ballrooms (564, 571).

8. Substantially all of plaintiff Cutler's services are performed in the club date field (2227). He has also made one or two recordings and appeared on one television program (2560; St. Min. 83-84; Exs. 310, DR). In the steady engagement field he has performed in hotels, restaurants and nightclubs (2227; St. Min. 70-71).

9. Plaintiff Peterson is primarily engaged in the club date single engagement field. He has also worked in concerts and in the steady engagement field in certain hotels and dance halls between 1945 and 1950 (1742-43; St. Min. 854-858).

10. Plaintiff Carroll is "almost exclusively" engaged in the club date single engagement field. He served as a leader in the steady engagement field at the Stork Club between 1945-48 (1425).

11. The plaintiffs in practicing their professions:

(a) maintain their own offices where they employ steady and/or part-time employees (567; St. Min. 71, 76-81, 258-59, 347, 360);

(b) acquire business as a result of their own contacts, reputations, and personal solicitations (567; St. Min. 78-79, 261-62, 360);

(c) engage in and pay for advertising (567; St. Min. 80-85, 87, 127-128, 261-262, 360) and prominently display their names wherever their engagements are played, thus indicating that the orchestra is, e.g., the Charles Peterson Orchestra (St. Min. 116, 260, 347).

12. Because of Carroll's and Peterson's expulsions from the union, they were thereafter precluded from actively taking part in their engagements either as conductors or instrumentalists (1777-79, 1936-37, 2039-44, 2110-12). (See F.F. XV.)

### *B. The Defendants*

13. Defendant Local 802 is a labor union affiliated with the defendant Federation and with the AFL-CIO. The territorial jurisdiction of defendant Local 802 consists of the five boroughs of New York City and Nassau and Suffolk Counties (Ex. CJ, Section 6, p. 5; St. Min. 80-81, 453).

14. Local 802 has over 30,000 members. They perform musical services as conductors, instrumentalists, arrangers and copyists. Local 802 represents, and has traditionally represented, among others, members who are orchestra leaders, subleaders and sidemen, and has collective bargaining agreements with various employers (Stipulated Fact 2).

15. Membership in a local affiliated with Federation implies membership in the Federation (Stipulated Fact 4).

16. Defendant Federation is a labor union affiliated with the AFL-CIO and it consists of 683 local unions (including defendant Local 802) located throughout the United States and Canada (Stipulated Fact 5).

17. Defendant Federation has over 260,000 members, who perform musical services as conductors, instrumentalists, arrangers and copists. The Federation, represents, and

has traditionally represented, among others, members who are orchestra leaders, subleaders and sidemen, and has collective bargaining agreement with various employers (Stipulated Fact 6).

18. Almost all orchestra leaders and sidemen in the United States are members of AFM or one of its locals (84, 164-65, 1105).

19. The AFM publishes and is governed by its "Constitution, By-Laws and Policy" (Exs. 300, 12, 160, 161, 162, 163, 164, 164a, 164b). Likewise, Local 802 publishes and is governed by its Constitution and By-Laws (Exs. 165-172, 141, 29) and other booklets including Price Lists and Wage Scale Booklets (Exs. 173-195, 205-209, 306).

20. Defendants Al Manuti, Max L. Arons and Hyman B. Jaffe are President, Secretary and Treasurer, respectively, of defendant Local 802 (Stipulated Fact 3).

21. Defendants Herman D. Kenin, Stanley Ballard and George V. Clancey are President, Secretary and Treasurer, respectively, of the defendant Federation (Stipulated Fact 7).

22. There is no evidence that any of the defendants who are officers of the defendant unions have committed, as individuals, any of the acts complained of by plaintiffs.

23. The defendants Al Manuti, Max L. Arons and Hyman B. Jaffe, together with other members of Local 802, are members of Local 802's Executive Board (the "Executive Board") (Ex. CJ, Section 4, p. 5).

## II. DEFINITIONS

24. "Single engagements" are engagements generally for one day, but always for less than one week (Stipulated Fact 8). All other engagements are referred to as "steady engagements" (id.).

25. For convenience of reference in this opinion, certain types of engagements sharing some common characteristics



will be referred to as groups. Thus, a "club date" is a single engagement such as a wedding, commencement, bar mitzvah, debutante party, fashion show, or other social event (Stipulated Fact 8; St. Min. 69, 242-43, 438, 457-59, 806). Steady engagements at hotels, nightclubs, dance halls or restaurants will be called "hotel" steady engagements. Single engagements other than club date single engagements (3108, 3183-84, 3830-31, 3841), e.g., TV, recording and all steady engagements, will be referred to as the "non-club date" field.

### III. MUSIC INDUSTRY GENERALLY

26. Members of defendant unions perform services as orchestra leaders, subleaders and sidemen on club dates and for hotels, restaurants, nightclubs, recording companies, broadcasting companies, theatres, steamships, and for The Radio City Music Hall, The Metropolitan Opera, The New York Philharmonic Society, and The City Center of New York (see F.F. I(A), supra, III, XIV, infra).

27. Plaintiffs and intervenors are in a market for musical services which includes states other than New York, as well as New York (1425, 2227, 2231).

28. Musical employment is highly casual, and except for employment by symphonic orchestras, a few opera societies and on staffs of network owned radio and television broadcasters, job tenure and enduring employer-employee relationships rarely exist (3673).

29. Musicians do not confine their activities to any one musical field. They seek engagements and perform services in any musical field where job opportunities exist (3291-96, 2156, 2159-65, 2417-18, 2875, 2889-90, 1159, 1160, Ex. CR). Thus, musicians who perform services as orchestra leaders, subleaders and sidemen in the club date field also perform services in non-club date fields (1160, 1314-15, 2417-18, 3074-75, 3291-96, 3661-62). Conversely, musicians who perform in the non-club date fields also work as leaders, sub-

leaders, or sidemen in the club date field when they are not otherwise engaged (564, 571, 1818, 1820, 1860, 1927-29, 2154-57, 2159-65, 2227-28, 2290-91, 2417-18, 2430, 2889-90, 3074-75, 3291-96, 3661-62).

30. The number of steady engagements is a small minority of the total number of engagements, single and steady (274-75, 350-51, 3108-09).

#### IV. LEADERS GENERALLY

31. Orchestra leaders, including plaintiffs, conduct at engagements at which they personally appear (839-41, 960, 1311, 1427; St. Min. 116, 393).

32. Conducting is a musical service and orchestra leaders, when conducting, fulfill the same function, whether they are "employers" (for any purpose) or "employees" (Stipulated Fact 11), and whether they are working in the single engagement or the steady engagement field (578-79, 713-16, 1054-56, 1182-83, 3535-36).

33. Only a relatively small group of musicians act as leaders all or virtually all the time. Plaintiffs are included in this group (3666-67; Ex. 58).

#### V. JOB OR WAGE COMPETITION OR OTHER ECONOMIC INTER-RELATIONSHIP BETWEEN LEADERS AND OTHER UNION MEMBERS

##### *A. Interrelationship between leaders and sidemen who occasionally lead*

34. A considerable number of musicians act only occasionally as leaders and act as sidemen the rest of the time (Exs. K, L, M; Stipulated Fact 10).

35. Such musicians who work as sidemen in club date or non-club date fields perform as leaders in the hotel steady and club date fields. They bid for the same jobs as full-time leaders such as plaintiffs and perform the same musical service when they get a job. They also perform in the same

places as full-time leaders (2291, 2553-54, 2571, 2395-96, 2411-12, 2422-23, 2427, 2428-30, 2874-75, 2889-90, 2894, 3038-40, 3052-54, 3088-89, 3293, 3653-54, 3666-68, Exs. 58 DE, pp. 188-89, HE; F.F. 29).

*B. Interrelationship between leaders and subleaders*

36. Plaintiffs belong to a group of orchestra leaders operating primarily in the club date field and occasionally in the hotel steady field who regularly use subleaders for their engagements. They generally do this when they accept simultaneous engagements for more than one orchestra. Subject to instructions which are sometimes given by the leader, the subleader performs all the musical services which the leader would have performed had he been present (327, 565-66, 573, 582, 607, 616-17, 812, 826-27, 708, 838, 895, 1010-11, 1193-94, 1864-66, 1896, 2604-06, 3045; St. Min. 73, 76, 130-31, 176, 276, 307, 314, 393, 801, 873-74).

37. Subleaders are employees (conceded by plaintiffs in marking defendants proposed findings of fact).

38. Each time plaintiffs personally conduct an orchestra in the hotel steady and club date fields, they displace the services of a subleader who would otherwise have been engaged to conduct the orchestra (583-84, 565-66, 573, 582, 617, 704, 845, 812-14, 960-65, 1194, 1313, 1353, 1375-76, 1778-79, 2039-44, 2604-06; St. Min. 83-84; F.F. 36).

*C. Interrelationship between leaders and sidemen*

39. Instrumentalists who perform services in orchestras other than as leaders or subleaders are referred to as sidemen.

40. Sidemen are employees (conceded by plaintiffs in marking defendants' proposed findings of fact).

41. Almost without exception, all members of defendant unions who are now orchestra leaders (including the individual plaintiffs herein) worked as sidemen when they

joined defendant unions and continued to work as sidemen for a number of years thereafter (Stipulated Fact 13).

42. All members of Local 802 are entitled to have their names included in the directory of membership of Local 802 under whatever category they select. Each of the individual plaintiffs, while a member of the union, was included in the directory as an instrumentalist. For example, Cutler is listed under the heading "saxophone," and Carroll was listed under the heading "drums" (Stipulated Fact 9).

43. Plaintiffs other than Peterson (2039) belong to a group of orchestra leaders, operating primarily in the club date field and occasionally in the hotel steady field, who often, but not always, play musical instruments in addition to conducting at engagements at which they personally appear (524, 609-10, 826, 839-40, 957-58, 961-62, 1194, 1311-12, 1352, 1375, 1427, 2370; Ex. DE, p. 37; St. Min. 117).

44. An orchestra leader, in playing an instrument, fills a requirement for an instrument in the orchestra just as any sideman does (194-95, 842, 1313-14, 1353, 1375-76, 3054-55).

45. Each time plaintiffs play instruments in the hotel steady or club date field they displace the services of a sideman who otherwise would have been engaged to play the same instrument that the particular plaintiff played (F.F. 43, 44; 609-10, 842, 958-62, 1194-95, 1313-14, 1353, 1375-76; 1778-79, 3657).

## VI. EMPLOYMENT RELATION IN TELEVISION AND RADIO

46. For many years Federation has entered into collective agreements with the three major television and radio broadcasting networks, viz., Columbia Broadcasting System, Inc., American Broadcasting-Paramount Theatres, Inc., and National Broadcasting Company, Inc. In addition, Local 802 enters into collective bargaining agreements with stations owned by the networks and with various other independently owned stations, including WPIX (Exs. BLI-4, BM, BN, BT, IO, IP, KJ, KM).

47. The networks agreements result from joint negotiations with the three networks and similar individual collective bargaining agreements are entered into with each of the three networks (2256-66).

48. The network collective agreements relate primarily to two areas of broadcasting, viz.:

(a) Live and video tape broadcasting (Exs. BL 1-4) under an agreement dated May 18, 1964, for a term commencing March 1, 1964, and ending June 30, 1966; and

(b) the recording of musical services on television film (Ex. 10) pursuant to an agreement dated May 1, 1964, for a term commencing May 1, 1964, and ending April 30, 1969 (2258-59).

49. The cost of furnishing music is a considerable expense to the networks and other broadcasting stations (2258, 2302).

50. Pursuant to collective agreements, each of the network broadcasting companies engages approximately 100 musicians, including orchestra leaders, who perform services on a regular annual basis (2262-63, 2268-69, 2305-06; Ex. BL 1-4). The musicians so engaged are generally referred to as "staff musicians" (2264, 2268-69). The networks, in addition, also employ musicians on a single engagement basis (2264, 2292-93, Ex. BL 1-4).

51. With regard to the services of musicians, whether employed either on a staff or a single engagement basis, each network broadcasting company, through the director of music operations or producer of a show:

(a) hires the orchestra leader (2256-57, 2270, 2271, 2317);

(b) hires each of the sidemen (2256-57, 2271, 2272-73);

(c) decides, subject to union minimum requirements, on the numbers of leaders and sidemen who are to be engaged (2272-73);



(d) determines, subject to contractual obligation, the compensation of musicians (2326);

(e) selects the sidemen who will play for the orchestra leader (2272). (The musicians performing services for the broadcasting company play under the leadership of different orchestra leaders, some of whom are staff conductors and others, guest conductors (2269, 2277-78));

(f) determines the compositions to be played (2273-74);

(g) exercises control over the musical direction and decides how the orchestras are to render their pieces, including such things as tempo and variations in an arrangement (2275-76, 2280, 2311-12, 2319-20); sometimes the orchestra leader will provide guidance to the TV executive responsible for the program (2321);

(h) calls for rehearsals (2274);

(i) disciplines and discharges musicians who are unsatisfactory (2288-89, 2323; Ex. IP, pp. 13, 26);

(j) pays all expenses connected with the performances of the orchestras, including the cost of arrangements, the orchestra leader's salary, the sideman's salary, doubling, cartage fees, wardrobe allowance, extra compensation where makeup or costumes are required, transportation, insurance of instruments (2272-73, 2281-84, 2317; Exs. BL 1, 3, par. 5; BL 4, p. 9; IP, pp. 18, 20, 21; IO);

(k) furnishes paid vacations, meal periods and rest periods (2281-82);

(l) makes payments on behalf of the musicians to a pension welfare fund (Ex. BL 1, 3, par. 9; 2281);

(m) pays severance pay to laid-off musicians (2265).

52. The person vested with control over live and video tape broadcasts is the producer of the particular program involved. The producer of programs owned by the net-

works is an employee of the broadcasting company (2313-14).

53. Music for television films generally consists of background music which is inserted after the performance has already taken place and been captured on film. The persons responsible for the music on television film are the musical director and producer, both of whom are employed by the network broadcasting company (2284-86, 2319-20). The musical director, working in conjunction with the producer of a particular program, customarily does the following things with regard to the services of musicians:

(a) determines the type of music to be used in the film (2284-85, 2320);

(b) determines the persons who are to compose and arrange the music (2284, 2320);

(c) determines the orchestra leader to be used (2257, 2320);

(d) determines the sidemen to be used (2257, 2320);

(e) determines when the music is to be recorded on the tape which will be integrated with the film (2285-86); and

(f) supervises the integration of the music with the film so that the music sound track is coordinated with the filmed action (2286-88).

54. The broadcasting companies withhold and pay over to the appropriate governmental agencies the usual employer deductions for all musicians, including orchestra leaders (2271). On rare occasions (less than six times a year for CBS), a broadcasting company engages the services of a name band and a lump sum is paid to the orchestra leader in payment for his services and the services of the sidemen performing with him (2297, 2299-2300, 2323).

55. The minimum union wages and working conditions relating to single engagements for networks are set forth

in the collective agreements between the networks and defendant unions and are summarized in the booklet published by Local 802 entitled, "Price List Governing Single Engagements Radio and Television" (Ex. GJ; 2327).

56. The broadcasting companies have effective control over the rendition of services by musicians engaged by the broadcasting companies (2276-77, 2284-85, 2288, 2313-14, 2317, 2321).

57. Plaintiff Cutler performed services as a leader for a telecast by Station WPIX, New York (Ex. DR-3). Plaintiff Cutler was paid by separate check and all employer deductions were made by Station WPIX (id.). There is no evidence that the degree of control exercised by the broadcasting company over the services of the musicians on Cutler's engagement differed from the control exercised by the broadcasting companies over musicians as set forth above.

## VII. EMPLOYMENT RELATIONSHIP IN RECORDING

38. Federation has entered into collective agreements with manufacturers of home phonograph records ("recording companies"). An agreement with recording companies expired December 31, 1963, and at that time an understanding had been reached between Federation and the recording companies with respect to the terms of a new collective agreement, which has not yet been reduced to writing (134-35).

59. The collective agreement between Federation and recording companies covers upwards of 1,000 recording companies and includes every major manufacturer of records in the United States and Canada (Ex. FG-1).

60. Federation has been certified by the National Labor Relations Board ("NLRB") as the collective bargaining agent for all musicians, including orchestra leaders, who perform services for recording companies (Ex. BE).

61. Musicians perform services for recording companies on a single engagement basis (1527, 2757).

62. Recording companies are in the business of manufacturing phonographs records which embody musical performances of members of defendant unions (1465-66, 1504, 2752-53).

63. An employee of the recording company known as the "artist and repertoire representative" (the "A&R man") has the ultimate responsibility for the musical product embodied in the phonograph recording. He actively participates in and has the last word in determining the nature of the various elements which comprise the recorded performance. In exercising this control the A&R man generally consults with the arranger-conductor and/or the vocalist, if any (2754-62, 2768-69, 2770-72, 2775-76, 1482, 1496, 1499-1502, 1504-05, 1508-11, 1518-11, 1522).

(a) A substantial number, probably a majority, of the popular recordings made feature vocalists rather than orchestras (2754, 2769, 523-24).

(b) The conductor of the orchestra used for recordings is also usually the arranger (2755, 1501-02).

64. The A&R man exercises the above-mentioned control over the following aspects of the preparation for the performance and the actual performance:

(a) selecting the orchestra leader (1501-02, 2754-55);

(b) determining the number and types of instruments to be used (1499-1501, 1518, 2754-55);

(c) employing a contractor to hire sidemen (the A&R man sometimes designates particular sidemen who are to be hired or avoided) (1518-19, 2756-58, 2762);

(d) deciding on the number and instruments of the musicians who are to perform (1503, 1518-19, 2754-56);

(e) determining the compositions to be played (1496, 1519-20, 2754-55);

(f) determining the seating arrangements and microphone placements for musicians (1504-05, 2758-60);

(g) determining when and where the actual recording session is to take place (1503-04, 2758, 2773); the recording session usually takes place at studios owned or leased by the recording company (id.);

(h) sometimes furnishing instruments to the musicians performing services (2764);

(i) determining the musical characteristics of the orchestra's performance including tempo, dynamics, tone coloring, volume, type of syncopation, and sometimes the nature of a sideman's performance (1508-11, 2761-62, 2763, 2775-76);

(j) sometimes requiring the addition of instrumentation to a recording after the original recording session ("sweetening"); often this subsequent sweetening takes place in the absence of the orchestra leader (1522).

65. All musical services must be performed to the satisfaction of the A&R man (1481-82, 1506-08, 1511, 2756, 2760, 2770, 2763). If the final recording does not meet with the approval of the A&R man, it will not be issued (1521, 2764).

66. The recording company pays compensation by individual checks payable to each of the musicians employed (2767-68, 2750; Ex. HP) or by a check payable to the leader or contractor for the total scale wages of leaders and sidemen which is transmitted to Local 802, less employer deductions (1491-91a, 1546-74, 2766-67). In the latter case, the recording company also sends a payroll record designating the gross and net amount payable to each musician (id.; Ex. EN).

67. The recording company withholds and pays over to the appropriate governmental agencies federal and state



withholding taxes and social security taxes for all musicians, including the orchestra leader. The recording company also pays disability insurance for each of the musicians, including the orchestra leader (1494, 2750, 2786; Ex. HP). The recording company makes contributions to a pension welfare fund on behalf of each musician, including the orchestra leader (Exs. BS, pp. 29-30, EQ-ES).

68. Featured artists enter into royalty contracts with recording companies. Under those agreements there are deducted from the royalties otherwise owing to the featured artist, production costs such as wages paid to an orchestra leader; wages paid to sidemen; costs of arranging and composing, and the wages of choral groups (1541-42, 2784-86). If there are no royalties or an insufficient amount of royalties, the recording company bears these expenses without reimbursement (1542, 2784).

69. The recording company enters into a Form B Contract with the orchestra leader with respect to each recording session at which phonograph records are made (2765-66, Exs. DH, HO), which provides that the "employer [record company] shall at all times have complete control over the services of employees under this contract and the leader shall, as agent of the employer, enforce disciplinary measures for just cause, and carry out instructions as to selections and manner of performance" (id.).

70. Cutler performed as a leader in the making of a recording (St. Min. 83-84). There is no evidence that Cutler's manner of performance and the degree of control by the recording company differed from that referred to above.

71. Paragraph 12(d) of the collective bargaining agreement between the recording companies and defendant unions provides (Ex. BS):

"All present provisions of the Constitution, By-Laws, rules and regulations of the Federation (except those relating to requiring membership in the Federation) are made

a part of this agreement to the extent to which their inclusion and enforcement as part of this agreement are not prohibited by any present existing and valid law. No changes in the Federation's Constitution, By-Laws, rules and regulations which may be made during the term of this agreement shall be effective to contravene any of the provisions hereof."

72. The recording company has genuine and effective control over the rendition of services by musicians engaged by it including the orchestra leader.

### VIII. MINIMUM PRICE REGULATIONS

73. Local 802's "Price List" Booklet requires each sideman to be paid minimum wages for single or steady engagements. Their wages are based upon a number of factors, including the type of engagement involved; the number of hours played; whether the sideman plays more than one instrument; whether playing is continuous or non-continuous; whether the musicians has to transport certain bulky instruments; whether the musician is required to furnish an organ or music folios; whether the musician is required to rehearse; whether there is a show lasting more than twenty minutes; and whether uniforms (other than tuxedos) must be furnished by the musicians (Stipulated Fact 14).

74. Local 802's "Price List" Booklet requires each leader to receive certain minimum compensation for the services rendered by him. Thus, Rule 1, of the Price List Booklet provides as follows:

"RULE 1. 'Regulations for Establishing Leaders' Fees in Single Engagement Unless Otherwise Provided For,'"

"A. An engagement played by one members shall charge in addition to the Union Scale of the engagement 25 per cent additional as Leader (Personnel Manager) fee.

"B. An engagement played by two members shall charge in addition to the Union scale of the engagement 50 per cent additional as Leader (Personnel Manager) fee.

"C. An engagement played by three members shall charge in addition to the Union scale for the engagement 75 per cent additional as Leader (Personnel Manager) fee.

"D. Where four or more men are employed the Leader shall charge and receive double the regular scale, i.e., 100 per cent additional as Leader (Personnel Manager) fee." (Stipulated Fact 17.)

75. Similarly, Local 802's "Price List" Booklet provides as to steady engagements:

"RULE 10. On all steady engagements the Leader (Personnel Manager) shall charge 25 per cent additional when only one (1) man is employed, 50 per cent additional when two (2) men are employed, 75 per cent additional when three (3) men are employed, and for all engagements of four (4) men or more he shall charge double the price per man, except where otherwise provided." (Stipulated Fact 18.)

76. Local 802's "Price List" Booklet provides that the subleader shall receive the following as his minimum wage for single engagements:

"RULE 2. In the absence of the Leader (Personnel Manager), the member representing him for any part or all of the engagement shall receive one-half the extra charge made in conformity with Rule 1, unless otherwise provided.

"A. On all outside (Single) engagements, on which the orchestra is called upon to rehearse and/or play a show and for which there is an extra charge. The Musician who actually conducts the rehearsal and/or show shall receive double the extra charge regardless as to who contracts the engagement, number of musicians employed or who stands in front of the orchestra." (Stipulated Fact 24.)

77. Similarly, in connection with steady engagements the "Price List" Booklet provides:

"RULE 11. In the absence of the Leader (Personnel Manager), the member representing him for all or part of the engagement shall receive one-half the extra charge made in conformity with Rule 1, unless otherwise provided." (Stipulated Fact 25.)

78. Thus, the subleader must receive as his minimum wages for conducting a four-piece band on a single engagement, one and one-half times the sideman's scale, or double the sideman's scale if a rehearsal or show is involved. (Stipulated Fact 26.)

79. Local 802 not only establishes minimum compensation for sidemen and orchestra leaders on single and steady engagements, but also requires orchestra leaders to charge purchasers prices which are not less than the aggregate of the minimum compensation payable to sidemen and leaders (Exs. 178, 179, 186-195; Stipulated Fact 27).

80. Other locals also set per man and leader minimum wages (Exs. 173-77).

81. The resolutions of May 17, 1960, and October 27, 1960:

(a) In the club date field establishments are classified by Local 802 as "Class A" or as "Special Class." Class A rates are higher than Special Class.

(b) In March 1960, resolutions were submitted by members of Local 802 for consideration at the April Price List meeting. One of the resolutions so submitted provided that the minimum scale wages of sidemen performing services on Class A club dates would be increased (Ex. Q).

(c) The April 1960 Price List meeting was scheduled to take place on April 18, 1960. Prior to the April Price List meeting, plaintiff Cutler, as well as other leaders, made

known to Local 802 officers objections to the adoption of the proposed resolutions (1229-30, 1397-1402).

(d) The April Price List meeting was adjourned for lack of a quorum (Ex. LI). The Executive Board, on May 17, 1960, passed the resolutions referred to above, to become effective with respect to club date engagements booked after June 15, 1960 (Exs. LI and JQ). Such action was taken pursuant to a standing resolution in the By-Laws granting to the Executive Board authority to adopt price list resolutions where they were not acted upon at a price list meeting because of the absence of a quorum (3263; Ex. 12, Section 3, p. 57).

(e) After the increase in rates for club date Class A engagements became effective, members of Local 802 appeared and requested that Special Class engagement minimum rates be increased in order to maintain the traditional differential between Class A and Special Class club date engagements (3246-65).

(f) On October 29, 1960, the Executive Board adopted a resolution increasing the rates of Special Class club dates (Stipulated Fact 16; Ex. CE).

82. Local 802, in order to insure that minimum wages and other working conditions are being observed, employs approximately 30 business representatives whose function it is to visit establishments at which members of defendant unions are engaged (622-23, 666, 3834).

83. Local 802 also furnishes to its members in certain fields (e.g., the club date field, the broadcasting field) "Price List" booklets which set forth the minimum wages and working conditions in those fields.

#### IX. MINIMUMS

84. Local 802 has regulations requiring the employment of minimum numbers of musicians for the various rooms of hotels, catering establishments and ballrooms in the club



date single engagement field. These regulations vary according to the establishment, function, day and time and apply to all club date single engagements attended by more than 75 persons (Exs. 178-185; 3238-39).

85. Federation and Local 802 have been parties to collective agreements with the purchasers of music for certain steady engagements pursuant to which the purchasers have agreed to employ a specified number of musicians (Network Television Agreement, EX BL 1-3; Radio City Music Hall Agreement, Ex. BH; Philharmonic Agreement, Ex. BZ-1; Metropolitan Opera Agreement, Ex. CB).

#### X. FORM B CONTRACT

86. Article 13, Section 33, of Federation's By-Laws provides:

"Members of the A. F. of M. are not permitted to sign any form of contract or agreement for an engagement other than that issued by the A. F. of M." (Ex. 300).

The form of contract issued by the AFM is the Form B Contract (Exs. Y, Z, EC).

87. The Form B Contract was first adopted in 1941 (Ex. Y, Art. XVI, pp. 170-179). It was recommended in order that orchestra leaders could qualify for social security benefits (3375). The language of the Form B Contract was formulated after discussions with the Treasury Department (Ex. EC 44-45) and then submitted to the Commissioner of Internal Revenue for a ruling on the question of liability for Social Security taxes (Ex. EC 45-46). The Commissioner ruled that the hotel employing the musicians in question was the employer for purposes of the Social Security tax (Ex. EC 47).

88. Since 1941, the Form B Contract has been amended from time to time and at present there are various types in use for different types of engagements. Each type desig-

nates the purchaser of the music as the employer and the leader as an employee (Exs. Z, Z-1, Z-2, DF-DI).

89. Article 16, Section 1A, of Federation's By-Laws provides that on traveling engagements (Ex. 300):

"A. Any individual member, or leader, in every case before an engagement is played, must submit his contract for same to the local union in whose jurisdiction same is played, or in the absence of a written contract, file a written statement with such local fully explaining therein the conditions under which same is to be fulfilled, naming the place wherein same is to be played, the amount of money contracted for, the hours of the engagement, as well as the names of the members who will play same and the locals to which they belong, the actual amount of money paid each individual sideman, which cannot be less than the wage scale specified in Article 15 of these By-Laws and (except in Canada) their Social Security numbers."

The written contract referred to is the Form B contract (Ex. 300, Art. 13, § 33).

90. Local 802, in practice, does not require the use of the Form B Contract on club date single engagements; it accepts reports (in person, by telephone, or by mail) of details of the agreement sufficient to show that union scale has been complied with. It also accepts contracts other than Form B Contracts (656-63, 3597-99). In addition, it accepts contracts (Form B or other types) which specify as the total price or wage "union scale" rather than any dollar amount (3597-3604, 3837).

91. Local 802 does require the use of the Form B Contract on steady engagements, although it does not insist that a Form B Contract be filed prior to every engagement (665-66).

92. Any member failing to use the Form B Contract, where it is required in practice, is subject to penalty (Stipulated Fact 30).

93. Local 802 requires that an engagement as a leader shall not be effective unless first approved by the Executive Board (Ex 165, Art. 4, § 5).

## XI. REGULATIONS PERTAINING TO TRAVELING MEMBERS

### A. 10% Surcharge

94. A tax called the "10% Traveling Surcharge" was assessed by the AFM on engagements played by members outside the jurisdiction of their home Local until 1964 (Ex. CM, Art. 15, § 1).

95. The 10% Traveling Surcharge was defined in the Constitution and By-Laws of the AFM as "An additional 10% based on the price of the Local in whose jurisdiction the engagement is being played \* \* \* added to the price [of the engagement] \* \* \*" (Ex. CM, Art. 15, § 3).

96. Federation's By-Laws provided that the leader was responsible for collecting and transmitting the traveling surcharge tax to Federation (Ex. CM, Art. 15, Sec. 7) and that the tax was to be distributed as follows: 4/10 was to be retained by Federation, 4/10 was to be paid to the local in whose jurisdiction the traveling engagement took place, and 2/10 was to be distributed to members of the orchestra playing the engagement (id.).

97. In April 1963, AFM's 10% Traveling Surcharge tax as it was then administered was held by the Second Circuit to violate Section 302 of the LMRDA in *Cutler v. AFM*, supra.

98. Federation's June 1963 Annual Convention adopted a resolution abolishing the traveling Surcharge tax, effective January 1, 1964 (Ex. LG).

99. At the June 1963 Convention, a new 10% wage differential on traveling engagements (the "Traveling engagement wage differential") was adopted. Article 15 of the 1964 Federation By-Laws provides that in the case of a

steady traveling engagement the "minimum wage to be charged and received by any member" shall be "no less than the wage scale of the local in whose jurisdiction the services are rendered, plus 10% of such local wage scale"; and that, in the case of a single engagement, the minimum wage to be charged and received shall be "no less than either the wage scale of the local in whose jurisdiction the services are rendered or the wage scale of the home local of the member performing such services, whichever is greater, plus 10% of the wage scale of the local in whose jurisdiction the engagement takes place" (Ex. 300, Art. 15, § 2).

100. The purpose of the traveling engagement wage differential is to protect work opportunities for local musicians within their respective local union jurisdictions (3675, 3725-28).

*B. Illustration of Application of the Traveling Engagement Wage Differential-Engagements Performed by Local 802 Members in Local 38, Westchester*

101. The Local 802 scale for club dates is higher than the union scale in the jurisdiction of Local 38, Westchester County, New York (741).

102. Pursuant to Article 15, Section 2, of Federation's By-Laws, members of Local 802 who perform club date single engagements in the jurisdiction of Local 38 in Westchester County are required to charge the Local 802 scale plus 10% of the Local 38 scale (Ex. 300).

103. As a result of the higher Local 802 scale and the 10% wage differential, the minimum union scale price which must be charged by a Local 802 orchestra leader performing in the jurisdiction of Local 38 is higher than the minimum union scale price which must be charged by a Local 38 leader performing in the same jurisdiction.

104. Notwithstanding the differential in scale price in favor of Local 38 members, Local 802 members, including

plaintiff Cutler, have performed engagements in the jurisdiction of Local 38, both prior and subsequent to 1960 increases in Local 802 scale (Exs. GK-GT, HE, HF, LI, JQ, CE, GK-GR; 2572-91; Stipulated Fact 16). Plaintiff Cutler, both before and after the 1960 increases in Local 802 scale, almost without exception, bid for jobs in Westchester at prices in excess of union scale (2587-90).

### *C. Restrictions on Job Solicitation by Traveling Members*

105. Under Federation's By-Laws a traveling member performing a steady traveling engagement is not permitted to solicit or accept a single engagement either in or out of the jurisdiction in which the steady engagement is being played during the tenure of the steady engagement (Ex. 300, Art. 17, § 14).

106. Under Federation's By-Laws, a member of a local may not form a traveling orchestra to compete with or fill engagements in his home local (Ex. 300, Art. 17, § 24). For example, a member of Local 802 may not form an orchestra to perform an engagement within Local 802's jurisdiction unless that orchestra consists entirely of members of Local 802.

107. Traveling orchestras which establish headquarters in the jurisdiction of any Local are not permitted to compete for or accept and play engagements in that jurisdiction (Exs. CM, 300, Art. 17, § 23).

108. An out-of-town orchestra leader playing a steady engagement in a particular jurisdiction is prohibited from playing a single engagement in that jurisdiction for some other client during the period of the steady engagement (Exs. CM, Art. 17, § 14; 300, Art. 17, § 14) or remain in the jurisdiction after completing a steady engagement to solicit another steady engagement (Exs. CM, Art. 17, § 17; 300, Art. 17, § 17). Nor may members of a traveling orchestra be used by the manager of a company with which they travel, or by the local employer, to displace the local orches-



tra or any member thereof, if the displacement interferes with the contract under which the local orchestra is employed (Exs. CM, Art. 16, § 31; 300, Art. 16, § 27).

109. A traveling band may not play a radio or TV engagement which is local in character (not on a network) (Ex. CM, Art. 23, § 1).

#### *D. The Local Work Dues Equivalent*

110. Since January 1, 1964, Federation's By-Laws have provided for the payment by traveling members of local work dues equivalents to locals which require such payments. Local work dues equivalents are payments equal in amount to the work taxes which locals impose upon their own members in connection with earnings from jobs performed within the jurisdiction of such locals. Such payments are based upon a percentage of the members' earnings from such jobs (Ex. 300, Art. 2, § 8(c)).

111. Prior to January 1, 1964, Federation's By-Laws provided that traveling members could not be required to pay local work dues equivalents on engagements to which the Federation traveling surcharge tax applied (Ex. CM, Art. 16, § 26).

112. Under Federation's By-Laws, local work dues equivalents may be imposed only by a local which "uniformly requires its own members to pay the same percentage of their scale wages in connection with the rendition of the same classification of services" (Ex. 300, Art. 2, § 8(c)). Local work dues equivalents may not exceed 4% of scale wages and may not be imposed on wages of traveling members "derived from symphony or opera services" (Ex. 300, Art. 2, § 8(E), (F)).

#### *E. Transfer Members*

113. Under Federation's By-Laws, a member of one local who moves his residence to a place within the jurisdiction

of another local and who indicates his wish to become a member of such other local, is called a transfer member (Ex. 300, Art. 14); and Federation locals are required to accept applications to grant full membership to transfer members who have resided in their jurisdictions at least six months (id., § 2).

114. Under Federation's By-Laws, Art. 14, a transfer member may not solicit or perform any steady engagement within that local's jurisdiction for a period of three months after the date he is granted transfer membership (id., § 7). He is also prohibited from performing engagements outside the jurisdiction of the transfer local, except that he may do so with orchestras consisting of members of the transfer local after three months (id., §§ 8, 9).

## XII. BOOKING AGENTS

115. Persons who act as "bookers, agents, representatives and managers of members, orchestras or bands, or who secure engagements and contracts for such members, orchestras and bands" are referred to as "booking agents" (Ex. 300, Art. 25, § 1).

116. Since 1936, Federation has required booking agents to enter into license agreements with Federation as a condition to representing or acting in behalf of Federation members (3370-73; Ex. JX).

117. Pursuant to the provisions of Federation's By-Laws, each such booking agent must enter into a standard form of license agreement with Federation under which he agrees not to charge more than 10% commission on steady engagements, a 15% commission on single engagements, not to book non-union musicians, and not to book orchestras for less than union scale wages and working conditions (3373-74; Ex. 300, Art. 25, pp. 151-59). Federation makes no charge for the license agreement (533, 999).

118. The regulation of booking agents was considered at Federation's 1936 Convention. At that time, many booking agents charged exorbitant fees to members and booked engagements for musicians at wages which were below union scale (1016-17, 1121-24, 3370-73). The President's report made at that Convention stated (Ex. JX):

"Many booking offices or agents do not now charge the standard wage for musicians and, in other cases where they do so, same is not paid to the musicians. This condition could only develop with the connivance of some contracting members or leaders who, in collusion with agents, frustrate the efforts of the union to enforce its wage scale. These leaders, or contracting members, by thus violating the laws of their organization, gain an advantage over other leaders in securing employment. As a result, a great percentage of the orchestras doing jobbing work or filling casual engagements, play for less than the union scale, and, in cases where the union tries to control the situation through the deposit of contracts with the union, false contracts are often deposited."

119. Following the submission of that report, Federation adopted provisions relating to booking agents which are substantially the same as those presently in effect (3370-74). Subsequent to the adoption of the regulations governing booking agents, the abuses just referred to were, to a large extent, eliminated (1017, 1123-24).

### XIII. CATERERS

120. Many club date single engagements take place in catering halls which are rented by purchasers of the music. Catering halls do not supply orchestras, but some proprietors of catering halls recommend particular orchestras to prospective purchasers and receive commissions from the orchestra leaders (757-59, 773-74, 2330-5, 2361-63, 3246-48).

121. Local 802's By-Laws contain the following standing resolution (Ex. CJ, pp. 75-76):

"A. Caterers, banquet managers and others connected directly or indirectly with halls, hotels and all similar establishments which provide facilities for public or private functions, are prohibited from engaging leaders or musicians, for such affairs.

"B. Caterers or establishments violating the above may be placed on the Unfair List for such time and under such conditions as shall be determined by the Executive Board.

"C. The payment or promise of payment, or any gift or consideration whatever, to the above is contrary to the principle of fair competition among members of this local, and any member guilty of such offense shall be fined not more than Five Hundred Dollars (\$500.00) or suspended, or both."

This standing resolution has been in effect for approximately fifteen years (3246).

122. In 1947, prior to the adoption of the By-Laws relating to caterers, Local 802 appointed a committee to investigate conditions in hotels and catering halls. The committee's preliminary report, which was printed in the February 1947 issue of ALLEGRO, stated (Ex. JN):

"The objective of this committee's important assignment can be stated simply: the elimination of the caterer from the music business and the restoration to the musician of his right to earn a living without any restrictions and pressures upon him. Your committee believes, and knows that in that belief it reflects the unanimous opinion of the membership, that all money spent for music should go to musicians and not to chisellers. We oppose any caterer booking orchestras because that obviously leads to a depressing of union scales. The caterer must be barred from compelling people to use a specific orchestra."

The committee found evidence of "monopoly" and "collusion."

#### XIV. COLLECTIVE BARGAINING

123. Defendant unions do not bargain collectively with purchasers of music or with orchestra leaders with respect to wages and working conditions applicable to single engagements (26, 252-54, 3262; St. Min. 581-82).

124. Defendant unions have for many years bargained collectively with purchasers of music in various non-club date fields (2984-95). Thus, there are presently in effect (or have recently expired and are in the process of negotiation), among others, the following collective agreements to which either or both of the defendant unions are parties:

(a) Collective agreement between Federation and phonograph recording companies, effective January 1, 1959 (Ex. BS).

(b) Collective agreements between Federation and both NBC and CBS covering network radio and television, dated May 18, 1964 (Ex. BL-1, BL-3).

(c) Collective agreements between Federation and both NBC and CBS covering local radio and television, dated May 18, 1964 (Ex. BL-2, BL-4).

(d) Collective agreement between Federation and television film producers (blank form) (Ex. IM).

(e) Collective agreement between Federation and various makers of television video tape, effective July 1, 1964 (Ex. HX).

(f) Collective agreement between Federation and television film producers (Ex. HY).

(g) Collective agreement between Federation and television producers relating to pay television motion pictures (Ex. HZ).



(h) Collective agreement between Federation and television video tape producers (Ex. BN).

(i) Collective agreement between Federation and Independent Motion Picture Producers (Ex. BO).

(j) Collective agreement between Federation and Producers of Non-Theatrical Documentary & Industrial Films (Ex. BQ).

(k) Collective agreement between Federation and advertising agencies covering television and radio commercial announcements (Ex. BT).

(l) Collective agreement between Federation and producers of electrical transcriptions (Ex. BV).

(m) Collective agreement between Local 802 and The League of New York Theatres, Inc., dated June 25, 1964 (Ex. BI).

(n) Collective agreement between Local 802 and Shubert Interests Operating Legitimate Theatres in New York City, dated September 2, 1963 (Ex. BJ).

(o) Collective agreement between Local 802 and both American Export Lines Inc. and United States Lines Co., dated April 24, 1963 (Ex. IB, IB 1).

(p) Collective agreement between Local 802 and Radio City Music Hall, dated September 30, 1963 (Ex. BH).

(q) Collective agreement between Local 802 and The Metropolitan Opera, dated July 1, 1961 (Ex. CB).

(r) Collective agreement between Local 802 and the Philharmonic-Symphony Society of New York (Ex. BZ, BZ 1).

(s) Collective agreement between Local 802 and New York City Opera, dated March 12, 1962 (Ex. BX).

(t) Collective agreement between Local 802 and New York City Ballet, dated March 1, 1962 (Ex. BY).

(u) Collective agreement between Local 802 and Music Publishers Protective Ass'n, Inc., dated September 21, 1964 (Ex. IC).

(v) Collective agreement between Local 802 and hotels or restaurants (Ex. BK)..

(w) Collective agreements between Local 802 and Cafe Geiger dated November 16, 1962, with letter of correction dated April 17, 1963 annexed (Ex. IA).

(x) Collective agreement between Local 802 and Michael Gaynor, regarding Flatbush Terrace, dated January 24, 1964 (Ex. CV).

(y) Collective agreement between Federation and the three major networks relating to TV film, dated as of May 1, 1964 (Ex. IO).

(z) Collective agreement between Local 802 and National Broadcasting Company, Inc., dated August 5, 1955 (Ex. IP).

(aa) Collective agreement between Local 802 and WNEW Radio New York, dated July 23, 1964 (Ex. KL). Similar agreements have been entered into with other stations (Exs. KJ, KK).

125. The collective agreements referred to above set forth the hours and working conditions of all musicians, including orchestra leaders, covered by those agreements. Those agreements were the result of negotiations between Federation or Local 802, or both of them, and the purchasers of music, or an association of purchasers of music (2995, broadcasting 2258-66; theatres 2992-93; steamships 3225-27; Radio City Music Hall 3020-22; Metropolitan Opera 2852-55; New York Philharmonic 3192-3; New York City Center Opera 2992; New York City Center Ballet 2992; hotels, restaurants and night-clubs 2988-89, 2991-92, 3197-3205, 3210, Exs. IT-JB).

126. Defendant unions, before bargaining collectively with the purchasers of music, conducted meetings of their

members to formulate the demands to be bargained for (hotels, restaurants and nightclubs, 3214-17, Ex. JC; Yorkville restaurants, 3224; steamships, 3226; theatres, 3283). No special invitations were sent to orchestra leaders to participate in the negotiations with the purchasers of the music (891-892, 1060). Upon completion of negotiations with purchasers, but prior to the execution of the collective agreement, members of defendant unions were given the opportunity to approve or disapprove of the proposed agreement (television networks 3183-4, Ex. II; recordings 3184-5, Ex. JT; television film (3186-87, Ex. IN; Radio City Music Hall 3022; New York Philharmonic-Symphony Society of New York, Inc. 3193; hotels, restaurants and nightclubs (3219-3222, 3225, Ex. JD).

## XV. MONOPOLY

127. Defendant unions endeavor to foreclose non-union orchestra or leaders from the music field principally by not permitting members to play in the same orchestra as non-members (Ex. 300 Art. 13, §§ 5-7; Art. 18, § 26; Ex. 165, Art. 4, § 1 (h)), by not permitting members to deal with unlicensed booking agents (Ex. 300, Art. 25, §§ 4, 22), by not permitting licensed booking agents to book engagements for non-members (Ex. 300, Art. 25 at p. 151), by securing the cooperation of television companies (2314-15), record companies (1469) and hotels (1704-06, 2341) in not hiring non-union bands and by precluding non-members from entering Local 802's exchange hall where sidemen are hired for engagements (2108).

## DISCUSSION

### I. CLASS ACTION

Plaintiffs claim that they represent a class of orchestra leaders largely engaged in the single engagement field who (a) are employers who regularly employ sidemen or employee musicians who are members of AFM, Local 802,

or another Local affiliated with AFM; and (b) are independent contractors largely engaged in the single engagement field. (Complaints, 60 Civ. 2939, par. 24; 60 Civ. 4926, par. 17) It is also alleged that "this complaint raises common rights; and a common relief is sought herein; and the object of this action is the adjudication of claims which do or may seriously affect the specific property rights of plaintiffs and of said class \* \* \*." (Complaints, 60 Civ. 2939, par. 23; 60 Civ. 4926, par. 16)

The class action is defined in Rule 23(a), Federal Rules of Civil Procedure:

"Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

"(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action or

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

The three categories of class actions in Rule 21(a), (b), (c) are called respectively "true," "hybrid" and "spurious." Under the prevailing view a judgment in the true class action is conclusive on all members of the class represented, in a hybrid class action on all members of the class as to rights in the res, and in a spurious class action on only the persons named as parties. Dickinson

v. Burnham, 197 F.2d 973, 979 (2d Cir.), cert. denied, 344 U.S. 875 (1952) and cases cited. Since *Hansberry v. Lee*, 311 U.S. 32, 43 (1940), commentators have urged the abolition of these distinctions in the effect of a judgment in the three types of class suits. *Dickinson v. Burnham*, supra at 979. The view advocated is reliance on the test of adequate representation to determine whether absent parties should be bound. *Rank v. Krug*, 142 F.Supp. 1, 154 n. 93 (D. Cal. 1956), modified on other grounds, *California v. Rank*, 293 F.2d 340 (9th Cir. 1961), modified on other grounds, *Dugan v. Rank*, 372 U.S. 609; *Fresno v. California*, 372 U.S. 627 (1936).

These divergent views have important practical ramifications. Since under the current view only the parties to the action are bound in a spurious class action, the issue of whether they adequately represent a class is only important as it relates to the right to intervene. *York v. Guaranty Trust Co. of N.Y.*, 143 F.2d 503, 528, n. 52 (2d Cir. 1944), rev'd on other grounds, 326 U.S. 99 (1945). It is merely a device for permissive joinder. *Carroll v. Associated Musicians of Greater New York*, 206 F.Supp. 462, 469-70, 51 LRRM 2310 (S.D.N.Y. 1962), aff'd, 316 F.2d 574, 53 LRRM 2063 (2d Cir. 1963).

Nevertheless, I find that plaintiffs fail to adequately represent the class they purport to represent. This suit is part of a series of suits in which the same orchestra leaders are leading a challenge to various union activities. The present suit challenges many phases of union regulation. If successful in all respects it would substantially weaken the union. It would not be surprising if there was a division among the orchestra leaders in the union on this subject. The complaints themselves indicate that some orchestra leaders willingly cooperate with the union (e.g., *Complaint*, 60 Civ. 4926, pars. 24, 15, 41). *Hansberry v. Lee*, 311 U.S. 32 (1940); *Giordano v. R.C.A.*, 183 F.2d 558, 26 LRRM 2380 (3rd Cir. 1950).



This question of conflict among the members of the proposed class was treated in three prior decisions involving musicians unions. In all, it was a basis for rejecting the propriety of a class suit. *Associated Orchestra Leaders of Greater Phila. v. Philadelphia Musical Soc.*, 203 F.Supp. 755, 757, 49 LRRM 3043 (E.D.Pa. 1962); *Cutler v. AFM*, 211 F.Supp. 433, 444-45, 51 LRRM 2729 (S.D.N.Y. 1962), *aff'd*, 316 F.2d 546, 53 LRRM 2060 (2d Cir.), *cert. denied*, 375 U.S. 941, 54 LRRM 2715 (1963); *Carroll v. Associated Musicians of Greater New York*, *supra* at 470-71.

Moreover, the plaintiffs do not adequately represent certain orchestra leaders whom they purport to represent. They lack certain characteristics that distinguish "name" bands:

- (1) Distinctive musical styles based on the arrangements used by the band and; perhaps, the style of the leader as a soloist;
- (2) National reputations; and
- (3) Leaders who always appear and never use sub-leaders.

These characteristics would be relevant in any evaluation of the status of the name bandleaders under the anti-trust laws.

The class suit or at least the representation of persons other than the parties to the suit fails on other grounds.

Rule 23(a)(1) requires that members of the class have a joint, common, or secondary right. The present suit clearly does not qualify, since the rights sought to be enforced are several and not secondary or derivative in nature.

Rule 23(a)(2) permits a class action where the rights of the members of the class are several and the action

involves claims to specific property. No specific property will be affected by the present suit, hence, this provision is ineffective as support for a class suit here.

Rule 23(a)(3) provides for the spurious class suit. As was observed earlier, such a suit binds only the parties to the action and is efficacious only as a device for permissive joinder. Therefore it is irrelevant whether this suit qualifies as a spurious class suit since no questions of joinder are now presented. Whether or not a spurious class action, only the parties will be affected. See Moore, 3 Federal Practice 3444-45, 3465 (2d ed. 1964).

Therefore, this action will be treated as affecting only the actual parties.

## II. ALLEGED ANTITRUST VIOLATIONS

The plaintiffs charge that the following acts of defendants violate the antitrust laws:

- (1) pressuring orchestra leaders into the union;
- (2) imposing minimum price regulations on orchestra leaders;
- (3) imposing minimum numbers of sidemen requirements on orchestra leaders;
- (4) requiring the use of the Form B Contract;
- (5) imposing restrictions on traveling orchestras;
- (6) failing to bargain collectively;
- (7) regulating booking agents and caterers;
- (8) monopolizing the music industry.

The plaintiffs' position as stated in the complaints is that these acts constitute a violation of the antitrust laws because they represent a combination between a union and orchestra leaders, including the unwilling plaintiffs, in restraint of trade.

## III. ANTITRUST—LABOR LAW

With the benefit of "the light shed by the Norris-LaGuardia Act on the nature of the industrial conflict" the Supreme Court first stated the current extent of organized labor's liability under the antitrust laws in *United States v. Hutcheson*, 312 U.S. 219, 7 LRRM 267 (1941). The Court read "the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." *Id.* at 231

Exercising logic which has been much discussed since the decision, the court stated: "The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act," *id.* at 236, and concluded that "so long as a union acts in its self-interest and does not combine with non-labor groups" the conduct enumerated in Section 20 of the Clayton Act was not a violation of the Sherman Act.

The statement of the exemption was further developed in *Allen-Bradley v. Local 3, International Bhd. of Electrical Workers*, 325 U.S. 797, 16 LRRM 798 (1945). The court said that the Norris-LaGuardia Act "emphasized the public importance under modern economic conditions of protecting the rights of employees to organize into unions and to engage in 'concerted activities for the purpose of collective bargaining or other mutual aid and protection.'" *Id.* at 805. However, the court held that unions could not, "consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services." *Id.* at 808.

The meaning of the term "non-labor" group has been developed in a series of cases dealing with the issue of whether a union could organize and regulate independent contractors. *Los Angeles Meat Drivers Union v. United*

States, 371 U.S. 94, 51 LRRM 2448 (1962); *Milk Wagon Drivers Union v. Lake Valley Farm Prods.*, 311 U.S. 91, 7 LRRM 276 (1940); *United States v. Fish Smokers Trade Council, Inc.*, 183 F.Supp. 227, 38 LRRM 2399 (S.D.N.Y. 1960); Cf., *Bakery Drivers Union v. Wohl*, 315 U.S. 769, 8 LRRM 457 (1941). Applying the Norris-LaGuardia Act, a search was made in these cases for a "labor dispute" within the meaning of that Act to determine whether an exemption from the Sherman Act was available. The criterion used was the presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors. If such a relationship existed the independent contractors were a "labor group" and party to a labor dispute under the Norris-LaGuardia Act. Hence, the Sherman Act was inapplicable to any combination between the union and the independent contractors.

The ultimate issue in determining whether a relationship exists which would exempt conduct complained of from the Sherman Act is whether the Work and functions performed by the independent contractors actually or potentially affect the hours, wages, job security or working conditions of the union members in the same industry. If so, the union may combine with the independent contractors by including them in the union and subjecting them to union regulation. *Los Angeles Meat Drivers Union v. United States*, supra; *United States v. Fish Smokers Trade Council, Inc.*, supra at 234.

Since the scope of the union exemption from the Sherman Act is defined by its self-interest in collective bargaining and protecting and improving conditions of employment, the activities complained of by plaintiffs will be proper if they relate to such legitimate union interests and are not carried on in combination with a non-labor group. "[T]he same labor union activities may or may not be

in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups." *Allen-Bradley Co. v. International Bhd. of Electrical Workers*, supra at 810.

#### IV. LABOR OR NON-LABOR GROUP?

A glance at the list of alleged illegal practices suggests that the legality of two of them depends on whether the plaintiffs comprise a non-labor group. This issue will be examined prior to considering the legality of the individual practices.

If employees, the plaintiff orchestra leaders are certainly a labor group. If employers or independent contractors, they will be a labor group only if they meet the test of job or wage competition or other economic interrelationship which was just discussed. For the purposes of examining the status of the orchestra leaders under the anti-trust laws in the club date and hotel steady engagement fields, it will be assumed, without deciding, that they are employers or independent contractors. See *Cutler v. AFM*, supra; *Carroll v. Associated Musicians of Greater New York*, supra.

##### *A. Club Date and Hotel Steady Engagement Fields*

I find that in the club date and hotel steady engagement fields the plaintiff orchestra leaders are in competition with employee members of the defendant union regarding jobs, wages and other working conditions. As a result, they comprise a labor group in these fields.

The evidence in this case discloses that plaintiffs made a practice of leading their own bands and, except for Peterson, often played instruments too. They also regularly booked more than one engagement for an evening, in which case they used subleaders to direct their orchestras.



In operating in this manner plaintiffs perform functions identical to acknowledged employees who were also union members—subleaders and sidemen. Moreover when one of the plaintiffs personally led his band he occupied a job that was a potential position for a subleader. When a plaintiff played an instrument as well as conducted, he filled a slot that was a potential job for a sideman and also displaced a subleader.<sup>2</sup> In displacing sidemen and subleaders from potential jobs, plaintiffs engaged in job competition with them.

As a consequence of this relationship, the practices of plaintiffs when they lead and play must have a vital effect on the working conditions of the non-leader members of the union. If they undercut the union wage scale or do not adhere to union regulations regarding hours or other working conditions when they perform, they will undermine these union standards. They would put pressure on the union members they compete with to correspondingly lower their own demands. The evidence disclosed that plaintiff Levitt actually did lead a band at a steady engagement at a dance hall for which he received less than the subleader's union minimum wage. (3323-24)

#### *B. Other Fields (Television, Recording and Concerts)*

Although virtually all of the plaintiff's time is used in playing club dates and hotel steady engagements, for the sake of completeness the other fields in which plaintiffs have engaged will now be considered.

Plaintiff Cutler has made one or two recordings and has had a television engagement. Plaintiff Peterson has had some concert engagements.

---

<sup>2</sup> If a subleader could be found who played the instrument usually played by the leader, then only a potential subleader's job would be lost.

In the concert field there is not sufficient evidence from which findings can be made either as to the status of Peterson as an employee or independent contractor, or as to the existence of job or wage competition. He has not met his burden of proof in this regard.<sup>3</sup>

In the television and recording fields the evidence is inadequate to support findings as to job or wage competition. Further, an orchestra leader's status here is quite different from his position in the club date or hotel steady engagement field. It is not fruitful to assume that they are independent contractors. Therefore, in order to determine whether plaintiff Cutler was included in a non-labor group in these areas it will be necessary to consider whether he is an independent contractor or an employee.

<sup>3</sup> It is unlikely that Peterson could show an antitrust violation in the concert area. His status in this field is relevant to two charges: pressuring leaders into the union and fixing minimum prices.

Since leading at concerts constitutes only a very small percentage of Peterson's activities and the rest of his business is conducted in a manner which justified the pressure to join the union, the fact that Peterson might be a "non-labor" independent contractor in the concert field is immaterial. The union would still be entitled to attempt to induce or force him to join.

Further, if Peterson only organizes the concerts and does not personally conduct or play, as has been his practice since expulsion, he has failed to establish that in this capacity pressure was, in fact, exerted on him to join the union. See V, *infra*. If Peterson actually conducts at the concerts, then it is likely that he is in job and wage competition with subleaders and a member of a labor group. As such, he would be a proper subject for unionization. See V, *infra*.

Regarding the charge of minimum price fixing, if Peterson does not conduct or play at concert engagements, this charge would be treated the same as it would in the club or hotel steady field. See VI, *infra*. There would be no antitrust violation. If Peterson does conduct at concert engagements, as stated above, he would probably be a member of a labor group and a proper subject for union regulation.

This issue must be resolved by examining the degree of control which is exercised over the details of the service rendered by the orchestra leader and the factors which make up the economic reality of the relationship, e.g., "the permanency of the relation, the skill required, the investment in the facilities for work and opportunities for profit or loss." *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947); *United States v. Silk*, 331 U.S. 704 (1947).

In contrast to the role of the orchestra leader in the single engagement field, *Cutler v. United States*, 180 F. Supp. 360 (Ct. Cl. 1960), the evidence discloses that in television and recording the orchestra leader is subject to considerable artistic supervision. An employee of the television or record company is charged with directing the performance and seeing that a product which fits the company's idea of a saleable item is produced. Usually the orchestra is integrated into a larger product which again must meet company standards. The television or recording company also selects the sidemen and pays them. The orchestra leader does not bear the risk of loss in the enterprise and generally does not have an interest in the profits (unless he is the featured artist on a recording). The facilities other than the instruments used, and occasionally even instruments, are furnished by the recording or television company.

After reviewing all the evidence of the relationship between the orchestra leader and the television or recording company, and principally for the above reasons, I conclude that in the television and recording fields the plaintiff Cutler is an employee. See *American Broadcasting Company* 134 NLRB 1458, 49 LRRM 1365 (1961). I make no finding as to big-name bands, which, as I noted earlier, are not represented among the plaintiffs.

The two practices complained of by plaintiffs with respect to which the status of the orchestra leaders as a labor group is relevant are: (1) pressuring plaintiffs into

joining the union; (2) fixing minimum leaders' fees and minimum engagement prices.

#### V. PRESSURING OF ORCHESTRA LEADERS INTO JOINING THE UNION

It is clearly permissible for a union to pressure a group of independent contractors comprising a labor group into joining the union. *Los Angeles Meat Drivers v. United States*, 371 U.S. 94, 103, 51 LRRM 2448 (1962). Picketing was upheld as a means of inducing independent contractors comprising a labor group to join a union in *Milk Wagon Drivers Union v. Lake Valley Farm Prods., Inc.*, supra, and an agreement foreclosing all but union jobbers from the smoked fish industry which was directed to forcing jobbers into the union was held to violate the Sherman Act in *United States v. Fish Smokers Trade Council, Inc.*, supra, only because the jobbers were found to comprise a non-labor group.

In a decision relating to the AFM, *United States v. AFM*, 47 F.Supp. 304, 11 LRRM 596 (N.D. Ill. 1942), aff'd, 318 U.S. 741, 11 LRRM 840 (1943) (per curiam), the Supreme Court held the union's attempt to "eliminate all musical performances over the radio except those presented in person by members of the American Federation of Musicians," id. at 307, to be exempt from the Sherman Act by virtue of the Norris-LaGuardia Act. See *National Labor Relations Act*, 29 U.S.C., § 158(3) (1958). By limiting employment to union members, a union is, of course, coercing non-union workers to join it. Since the former is permissible, the latter certainly is.

There is no evidence in the record to indicate that the unionization of the plaintiffs was other than a matter of independent union action motivated by union self-interest. *Allen-Bradley v. Local 3, International Bhd. of Electrical Workers*, supra at 811; *United States v. Hutcheson*, supra at 232.

In conclusion, since the plaintiffs are a labor group in the club date and hotel steady engagement fields, the defendants do not violate the antitrust laws in pressuring them into membership.

Since their expulsion from the defendant unions, Carroll and Peterson have not personally led or played at their engagements. They merely book and organize them. In this capacity they do not compete with sidemen or subleaders and the basis of the conclusion that they are a labor group falls. However, the union does not significantly hinder them from carrying on their business in this fashion. (See F.F. 12, 127.) Insofar as they do not themselves conduct or play, the charge of pressuring them into the union has not been sustained.

In the television and recording fields, the union is unquestionably free to pressure orchestra leaders like plaintiffs into membership since they are employees.

#### VI. FIXING MINIMUM PRICES CHARGED BY LEADERS

The minimum prices set by the union are equal to the total minimum wages of the sidemen employed plus a leader's minimum fee. If the leader does not participate in the engagement but employs a subleader, then a prescribed portion of the leader's fee goes to the subleader. The remaining fraction of the leader's fee goes to the leader. In reciting the extra charges to be paid a leader, the union Price List booklet refers to the leader in parenthesis as a "personnel manager."

In view of the competition between leaders and sidemen and subleaders which underlies the finding that the leaders are a labor group, the union has a legitimate interest in fixing minimum fees for a participating leader and minimum engagement prices equal to the total minimum wages of the sidemen and the participating leader. Any cuts by participating leaders of their fees below union minimums



or in the price of an engagement below a union minimum equaling the total minimums of the participants puts an obvious downward pressure on the wages of subleaders and sidemen (e.g., 1122).

The legitimacy of the concern of the union in fixing the minimum prices to be charged by a group of independent contractors comprising a labor group was upheld in *Local 24, International Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 43 LRRM 2374 (1958). The Supreme Court reversed a decision by the Ohio Supreme Court in which a collective bargaining agreement fixing the minimum rental prices of driver-owned trucks was held to constitute a violation of the Ohio antitrust law as a combination between the union and a non-labor group to fix prices. The Supreme Court held that the rental price of driver-owned trucks was a proper subject of bargaining under the National Labor Relations Act in view of the purpose of the provision to protect the wage scale of employee-drivers as well as to provide a decent income to the owner-drivers.

In *Milk Wagon Drivers Union v. Lake Valley Farm Prods., Inc.*, supra, the Supreme Court held the Sherman Act inapplicable to a union's efforts to organize a group of "vendors" who owned their own trucks and bought milk for resale to retail stores. The union's purpose was to improve the working conditions and "wages" of the vendors and to thereby protect the standards of the employee-drivers.

The question of whether the union can also provide a certain minimum compensation for "personnel managing" services to leaders who merely arrange an engagement (e.g., solicit it and organize the band) without participating in it, and insure a similar payment above the regular subleader's fee when they do participate is more difficult. Indeed, as noted earlier, Carroll and Peterson do not now personally lead at their engagements, but merely arrange them. The leader who performs the necessary functions

of soliciting and organizing engagements also negotiates the price of the engagement with the purchaser of the music. It is unquestionably true that skimping on the part of the person who sets up the engagement so that his costs are not covered is likely to have an adverse effect on the fees paid to the participating musicians. By fixing a reasonable amount over the sum of the minimum wages of the musicians participating in an engagement to cover these expenses, the union insures that "no part of the labor costs paid to a \* \* \* [leader] would be diverted by him for overhead or other non-labor costs." *Greenstein v. National Skirt & Sportswear Ass'n, Inc.*, 178 F.Supp. 681, 689 (S.D.N.Y. 1959).

In *Greenstein v. National Skirt & Sportswear Ass'n, Inc.*, supra, the status of an analogous agreement between a union and manufacturers of ladies clothing to the effect that the manufacturers pay to contractors who produce their garments an amount at least equal to the combined wages of the contractor's employees and a reasonable amount to cover overhead was in issue on a motion for preliminary injunction. The court concluded that the agreement did not violate the Sherman Act without proof that it was a result of a conspiracy to restrain trade between the employer and the union. "If these protective clauses were demanded and obtained by the union \* \* \* as a matter of independent action in furthering the welfare of the employees they represent, then the *Allen-Bradley* case \* \* \* is inapposite." *Id.* at 689. *Allen-Bradley v. Local 3, International Bhd. of Electrical Workers*, supra at 811; *United States v. Hutcheson*, supra at 232.

There is no evidence in this record to indicate that the minimum price lists were sought by the union as part of a conspiracy in which the union aided "non-labor groups to create business monopolies and to control the marketing of goods and services." *Allen Bradley v. Local 3, International Bhd. of Electrical Workers*, supra at 808. Nor

is there any evidence which indicates that the increment to the personnel manager is unrelated to his costs in that function. I conclude that the union's price lists do not violate the Sherman Act.

In recording and television, subleaders are apparently not used and the leader's fee would go to the actual conductor. It is perfectly permissible for the union to negotiate a minimum wage for leaders in these fields since they are employees.

The legality of the other acts charged to be violations of the antitrust laws may be considered without regard to the status of the plaintiffs as a labor group. In all of the following matters there is no evidence to indicate that the defendants acted other than independently in their own self-interest. *Allen-Bradley v. Local 3, International Bhd. of Electrical Workers*, supra at 811; *United States v. Hutcheson*, supra at 232.

#### VII. REFUSAL TO BARGAIN

The defendant unions do not bargain collectively either with orchestra leaders or purchasers of music in the club date single engagement field. Insofar as the antitrust laws are concerned, it is not illegal for a union to refuse to bargain with an employer or a group of employers. *Hunt v. Crumboch*, 325 U.S. 821, 16 LRRM 808 (1945). Therefore, even assuming that the orchestra leaders are employers in the single engagement field, defendants have committed no violation of law by failing to bargain with them.

#### VIII. IMPOSING MINIMUM EMPLOYMENT QUOTAS

The defendants have succeeded in imposing minimum numbers of men as requirements on various types of engagements. Minimum quotas are included within the exemption from the Sherman Act afforded by the definition

of a labor dispute in the Norris-LaGuardia Act. *United States v. Carrozzo*, 37 F.Supp. 191 (N.D. Ill.), *aff'd*, 313 U.S. 539 (1941) (*per curiam*); *United States v. AFM*, *supra*.

#### IX. REQUIRING ORCHESTRA LEADERS TO USE THE FORM B CONTRACT

The language of the Form B Contract describes the orchestra leader as an employee and the purchase of the music as an employer. Its function is apparently to help establish this relationship in law. It also serves as a means of policing adherence to union scale, since the union requires that such contracts or, in the club date field, a report, be filed. The contract shows the price and terms of the engagement.

It is not clear how the use of the Form B Contract can result in a restraint of trade. In practice, the contract has failed miserably in fulfilling its primary purpose—making employees out of orchestra leaders.

The status of orchestra leaders in the club date single engagement field has been ruled on by courts on several occasions. In each instance the courts looked to all the factors which made up the employment relationship and concluded that the orchestra leaders involved there (*Cutler*, *Carroll*, *Peterson*) were employers. E.g., *Cutler v. AFM*, *supra*; *Carroll v. Associated Musicians of Greater New York*, *supra*; *Cutler v. United States*, *supra*. The Form B Contract was signally unpersuasive, "a self-serving subterfuge which is not entitled to any weight," according to Judge Lumbard, *Cutler v. AFM*, 316 F.2d at 548-49, 53 LRRM 2060. I can see no restraint of trade in the terminology in the Form B Contract referring to orchestra leaders as employees.

Nor does the requirement that the contracts be filed with the union violate the antitrust laws. The union has a

legitimate interest in knowing the terms under which its members work and does not restrain trade in gathering this information.

## X. REGULATING BOOKING AGENTS AND CATERERS

### A. *Booking Agents*

The Federation instituted the licensing of booking agents and the fixing of maximum commissions at a time when the activities of booking agents were instrumental in depressing wages paid to union musicians below the union scale. Apparently, similar abuses by booking agents existed in other fields too. *Edelstein v. Gillmore*, 35 F.2d 723, 726 (2d Cir. 1929) (actors). The objective of the Federation was the elimination of the practices which undermined the musicians' wage structure and the regulations adopted were successful.

Booking agents are independent contractors not in job or direct wage competition with members of the defendant unions. Apparently, no court has had to decide the question of whether a group of independent contractors performing different functions than a union's members and not in competition with union members for jobs may be subjected to union regulations consistent with the antitrust laws.

In affirming the decision of the district court in *Los Angeles Meat Drivers Union v. United States*, supra, the Supreme Court was careful to note and repeat, *id.* at 103, the absence of "any actual or potential wage or job competition, or of any other economic interrelationship, between the grease peddlers [independent contractors] and the other members of the union." *Id.* at 98. On this basis it is safe to assert that economic interrelationships other than actual or potential job or wage competition will suffice to support a finding that a group of independent contractors are a labor group. *Id.* at 104 (Goldberg, J. concurring).



The scope of the exemption accorded to labor from the antitrust laws is determined by the definition of "labor dispute" in Section 13 of the Norris-LaGuardia Act, 29 U.S.C. § 113. *United States v. Hutcheson*, supra. Section 13(c) provides that such a dispute "includes any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." A person is "participating or interested in a labor dispute" under Section 13(b) if he "is engaged in the same industry, trade, craft, or occupation, in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation."

This definition of a labor dispute is the source of the test of actual competition or other economic interrelationship between independent contractors and union members for determining whether the former is a labor group that the union may regulate. *Los Angeles Meat Drivers v. United States*, supra; *Milk Wagon Drivers Union v. Lake Valley Farm Prods., Inc.*, supra. Although job and wage competition may be the most common indicia of a labor dispute involving independent contractors, there is no reason why such competition should be the only criterion satisfying the Norris-LaGuardia definition.

Because the activities of the booking agents here have and had a direct and substantial effect on the wages of the members of defendants, I find that they are in an economic interrelationship with the members of defendants such that the defendants are justified in regulating their activities without contravening the Sherman Act. Furthermore, I find the regulations to be reasonably related to their

interest in maintaining observance of union scale wages and working conditions.

### *B. Caterers*

Caterers, also independent contractors not in job or wage competition with union members, are in a unique position to affect the choice of orchestras by purchasers of music and the wages and working conditions of musicians. They have frequent contact with purchasers of music, control places where musicians perform and are relied on to arrange many aspects of the functions at which musicians perform.

The evidence discloses that caterers took advantage of their position before the union adopted its regulations to, in effect, book orchestras and they continue to do so, at least to some extent. Caterers recommend orchestras to customers and receive commissions from orchestra leaders. These practices actually or potentially affect the wages of the musicians involved.

I believe that this constitutes an economic interrelationship which permits the defendants to regulate and prohibit the booking activities of the caterers without violating the Sherman Act.

## XI. RESTRICTIONS ON TRAVELING ORCHESTRAS

Various AFM regulations favor the employment of local musicians rather than musicians from outside the jurisdiction. The principal incentive to employ local musicians is a requirement that "foreign" musicians be paid higher wages.

Local employment and working conditions have long been recognized as legitimate concerns of labor unions. See *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921). In the face of anti-trust attack, courts have repeatedly sustained union regu-

lations requiring a foreign employer to adhere to the shorter workday and the higher wage scale of the standards prevailing in his home local or the local where the work was to be performed and to hire a specified percentage of his men from the latter local. *Rambusch Decorating Co. v. Brotherhood of Painters*, 105 F.2d 134, 4 LRRM 543 (2d Cir. 1939), cert. denied, 308 U.S. 587, 5 LRRM 693 (1939); *Barker Painting Co. v. Brotherhood of Painters*, 23 F.2d 743 (D.C. Cir. 1927), cert. denied, 276 U.S. 631 (1928); *Barker Painting Co. v. Brotherhood of Painters*, 15 F.2d 16 (3rd Cir. 1926), cert. denied, 273 U.S. 748 (1927).

The Second Circuit noted in *Rambusch*, supra at 138:

" \* \* \* Of course, the real point here relied on is the supposed discrimination between non-resident and resident contractors. Discrimination of this general kind is one of the most natural things in the world, applied by states and cities in civil service appointments; by courts in cost bonds and other burdens against non-residents; by merchants, customers, laborers, and servants in trusting and favoring the local man with whom they have long dealt and expect to deal in the future. \* \* \* "

" I find no antitrust violation in the regulations here protecting local employment opportunities.

## XII. MONOPOLIZATION

Plaintiffs' claim that the defendant unions are attempting to or have monopolized the music industry boil down to the fact that the defendants are enforcing a closed shop. It is clear that this violates no antitrust law. *United States v. AFM*, supra; *Courant v. International Photographers of Motion Picture Industry*, 176 F.2d 1000, 24 LRRM 2510 (9th Cir. 1949), cert. denied, 338 U.S. 943, 25 LRRM 2265 (1950); *Kolb v. Pacific Maritime Ass'n*, 141 F.Supp. 264 (N.D. Cal. 1956).

In conclusion I find that defendants have violated no antitrust law. The complaints also allege the existence of

a common-law restraint of trade. I find this charge to be equally without substance.

Although the defendants have successfully defended this suit, they are not entitled to attorneys' fees. 15 U.S.C. § 15; *Talon, Inc. v. Union Slide Fastener, Inc.*, 266 F.2d 731, 739-40 (2d Cir. 1959); *Alden-Rochelle, Inc. v. ASCAP*, 80 F.Supp. 888, 899-900 (S.D.N.Y. 1948).

### Conclusions of Law

1. The defendant unions are labor organizations within the meaning of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-113; the National Labor Relations Act, 29 U.S.C. § 151 et seq.; and the Clayton Antitrust Act, § 6, 29 U.S.C. § 17.
2. Defendants' motion to strike certain evidence, on which decision was reserved, is denied.
3. Plaintiffs Turecamo and Terry are no longer parties to this action.
4. Plaintiff Orchestra Leaders of Greater New York is not a proper party plaintiff and lacks standing to sue in this action.
5. The plaintiffs have failed to establish their claim to represent other orchestra leaders. Only the parties to the action will be affected by the decree.
6. There is job and wage competition and other economic interrelationships, significantly affecting defendants' legitimate union interests between plaintiffs in the club date single and hotel steady engagement fields and other employee-members of defendant unions who perform services as subleaders and sidemen in the club date and hotel steady engagement fields.
7. The plaintiffs are employees of the recording companies and television broadcasters when they perform services for them.
8. The plaintiffs constitute a "labor" group.

9. The defendant unions may legally pressure the plaintiffs into becoming members.

10. None of the defendants' regulations and practices complained of by plaintiffs constitute a violation of the federal antitrust laws (15 U.S.C. §§ 1 et seq.) or a common-law restraint of trade. They all come within the definition of the term "labor dispute" in the Norris-LaGuardia Act, 29 U.S.C. § 113, and are exempt from the antitrust laws.

11. The complaints in these actions should be dismissed and judgments entered for defendants, with costs to defendants.

### **Judgment**

#### **(TITLE)**

The issues in the above-entitled actions having been regularly brought on for trial before Hon. Richard H. Levett, without a jury, the parties having appeared by their respective counsel, and the issues having been duly tried; and the Court having filed its Opinion and Findings of Fact and Conclusions of Law on May 18, 1965 directing judgment as herein provided; it is

ORDERED, ADJUDGED AND DECREED that the above entitled actions be and they hereby are dismissed on their merits, and that defendants recover from plaintiffs the costs in these actions.

**RICHARD H. LEVETT**  
U. S. D. J.

New York, N. Y.  
May 24, 1965

Judgment Entered 5/25/65  
**JAMES E. VALACHE**  
Clerk

June 25th 1965  
Costs taxed in the sum of \$3523.78  
and added to the judgment.

**JAMES E. VALACHE**  
Clerk



**Notice of Appeal**

(TITLE)

60 Civil 2939

PLEASE TAKE NOTICE that plaintiffs appeal to the United States Court of Appeals for the Second Circuit from (a) judgment herein of the United States District Court, signed by United States District Judge, Richard H. Levet, on May 24, 1965, and entered on the docket in the office of the Clerk of this Court on the 25th day of May, 1965, and (b) said Court's "OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW" (OPINION No. 31232) dated May 17, 1965, and filed May 18, 1965, insofar (i) such judgment dismisses the above entitled actions and complaints on their merits; (ii) said judgment awards defendants costs against plaintiffs; and (iii) said District Court's "FINDINGS OF FACT AND CONCLUSIONS OF LAW" differ from the PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW presented by plaintiffs to the said District Court for the Southern District of New York (copies of such PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW as submitted by plaintiffs having been first duly served upon attorneys for defendants herein).

Dated: New York, N. Y.  
May 27, 1965

Godfrey P. Schmidt  
*Attorney for Plaintiffs*  
Office and P. O. Address  
60 East 42nd Street  
New York City, N. Y. 10017  
MU 7-1950

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Nos. 75 and 76

September Term, 1966

(Argued November 28, 1966)

Decided January 30, 1967)

Docket Nos. 30445 and 30446

JOSEPH CARROLL, CHARLES PETERSON and CHARLES TURECAMO, as Treasurer, Orchestra Leaders of Greater New York,

*Plaintiffs-Appellants*

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, HERMAN D. KENIN, as President of said Federation, STANLEY BALLARD, as Secretary of said Federation, and GEORGE V. CLANCY, as Treasurer of said Federation, ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, and AL MANUTI, as President of Local 802, MAX L. ARONS, as Secretary of Local 802 and HI JAFFE, as Treasurer of Local 802,

*Defendants-Appellees*

Before FRIENDLY, SMITH and ANDERSON, Circuit Judges.

Appeal from a judgment dismissing the two complaints in a consolidated class action, charging the defendants with violations of the anti-trust laws, in the United States District Court for the Southern District of New York, Richard H. Levet, J. Affirmed except as to determination of issue of price-fixing on which the judgment is reversed and remanded.

Godfrey P. Schmidt, Esq., New York City  
New York, for Plaintiffs-Appellants

Emanuel Dannett, Esq., New York City,  
New York (McGoldrick, Dannett, Horo-

witz & Golub, Attorneys for Appellees American Federation of Musicians of the United States and Canada, Herman D. Kenin, Stanley Ballard and George V. Clancy; Ashe & Rifkin, Attorneys for Appellees Associated Musicians of Greater New York, Local 802, Al Manuti, Max Arons and Hy Jaffe; Henry Kaiser, Esq., Jerome H. Adler, Esq., David I. Ashe, Esq., George Kaufmann, Esq., and Eugene Mittelman, Esq., on the brief) for Defendants-Appellees

ANDERSON, Circuit Judge:

Plaintiffs-appellants are orchestra leaders, who in a series of suits over the past several years, have challenged the legality of numerous activities and regulations of the appellees.<sup>1</sup> The present actions instituted by appellants, Peterson and Carroll, in which Ben Cutler and Marty Levitt were allowed to intervene, as claimed class actions on behalf of themselves and as representatives of other orchestra leaders, charged the American Federation of Musicians and its New York affiliate, Associated Musicians of Greater New York, Local 802, with nine separate violations of the anti-

<sup>1</sup> Carroll v. Associated Musicians, 206 F. Supp. 462 (S.D.N.Y. 1962) affirmed, 316 F.2d 574 (2 Cir. 1963); Cutler v. American Federation of Musicians, 211 F. Supp. 433 (S.D.N.Y. 1962), 316 F.2d 546 (2 Cir.), cert. denied 375 U.S. 941 (1963). By stipulation, the testimony in those actions is made a part of the record in this action.

Appellants' motions for preliminary injunctions were passed upon on appeal by this court in Carroll v. Associated Musicians, 284 F.2d 91 (2 Cir. 1960), affirming 183 F. Supp. 636 (S.D.N.Y. 1960); Carroll v. American Federation of Musicians, 295 F.2d 484 (2 Cir. 1961); and Carroll v. American Federation of Musicians, 310 F.2d 325 (2 Cir. 1962).

trust laws, none of which is protected by either the Clayton Act<sup>2</sup> or the Norris-La Guardia Act.<sup>3</sup>

<sup>2</sup> Section 6 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 17 (1959) provides:

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purpose of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Section 20, of the Clayton Act, 38 Stat. 738 (1914), 29 U.S.C. § 52 (1959) provides:

"No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which there is no adequate remedy at law . . . And no such restraining order or injunction shall prohibit any person or persons [from striking, assembling, organizing, etc.] . . ."

<sup>3</sup> Section 4 of the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 104 (1959), provides:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons . . . from doing, whether singly or in concert, any of the following acts:

[striking, joining a labor union, giving strike benefits, lawfully aiding in a labor dispute, publicizing a dispute, assembling, etc.]"

"The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the associa-

The first complaint was filed in July 1960 and the other, brought to include a challenge to an increase in the musicians' wage scale adopted after the July suit was started, was filed in December, 1960. Both actions sought preliminary and permanent injunctive relief, as well as treble damages for alleged injuries. The district court, sitting without a jury, after a trial of five weeks, dismissed the complaints and entered judgment for the defendants. *Carroll v. American Federation of Musicians*, 241 F. Supp. 865 (S.D.N.Y. 1965). The appeal to this court presents the question of whether various practices of the unions violate the Sherman Act.<sup>4</sup>

The American Federation of Musicians, an affiliate of the AFL-CIO, consists of 683 local unions and has a membership of more than 260,000. Almost all of the musicians in the United States, referred to in the trade as sidemen, and most of the orchestra leaders and sub-leaders, who act as substitute orchestra leaders, are members of the Federation or its locals. Local 802, with 30,000 members, has virtual

tion or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." Norris-LaGuardia Act § 13, 47 Stat. 73 (1932), 29 U.S.C. § 113(c) 1959.

<sup>4</sup> 26 Stat. 209 et seq. (1890), 15 U.S.C. §§ 1 and 2 (1959):

Section 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

Section 2:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."



control of labor in the music industry in the New York area. The appellants were members of Local 802 when this action was brought, but Carroll and Peterson have been expelled from membership since that date.

Essential to an understanding of the issues presented is a definition of terms and a description of the practices which distinguish the industry.

Musical engagements are generally classified as either "steady", those lasting for longer than one week, or "single", usually one day or one performance affairs but including all engagements lasting less than one week. The much sought after steady engagements are rare in comparison with the number of single engagements.

The predominant form of single engagement is the "club date", such as weddings, parties and dances, which provides employment for the largest number of musicians. Single engagements also include the "non-club date" field consisting of television appearances or recording engagements, etc. The distinction between the kinds of single engagements is vital; the non-club date engagements are ordinarily governed by collective bargaining agreements concluded by the union and the "purchaser" of music. The same is usually true of the steady engagement field. Local 802 has collective bargaining agreements with the major users or "purchasers" of live music within its area such as recording companies, hotels, television and film producers, opera companies and theatres. These agreements treat the "purchaser" as the employer and the orchestra leader as its employee, little different from a sideman. Indeed, in this field such a characterization would ordinarily be justified, because in the recording industry, for example, in which all engagements are governed by such collective bargaining agreements, a regular employee of the recording company exercises general supervision over the orchestras hired. He selects the orchestra leader, who does the conducting and some arranging, hires the sidemen and determines their

number, their instruments and the compositions to be played and exercises general control over the orchestra's performance. The recording company pays each musician, as well as the orchestra leader, individually and is responsible for the withholding of social security, federal and state taxes, as well as all bookkeeping. The practices are similar in most engagements covered by the union's collective bargaining agreements.

The club date field is entirely different in that it is not governed by collective bargaining agreements. Rather, the orchestra leader secures the engagement, either by himself or through booking agents, and negotiates directly with the music purchaser, usually for a flat price, and the responsibility for collecting the fee, paying the sidemen, withholding taxes and keeping records is his. His remuneration is the difference between his costs, primarily the wages of sidemen, and the amount received from the music purchaser. The district court assumed, without explicitly finding, that orchestra leaders are employers or independent contractors when operating in this field. In light of the fact that an orchestra leader working a club date is no different from any other independent contractor, who employs his own laborers, we concluded, as we have in other contexts in this litigation, see, e.g., *Cutler v. American Federation of Musicians*, 316 F.2d 546, 549 (2 Cir. 1963), affirming 211 F. Supp. 433, 445 (S.D.N.Y. 1962); *Carroll v. American Federation of Musicians*, 295 F.2d 484, 486 (2 Cir. 1961); *Carroll v. Associated Musicians*, 284 F.2d 91 (2 Cir. 1960), affirming 183 F. Supp. 636 (S.D.N.Y. 1960), that orchestra leaders are employers in the club date field.

It should not be inferred, however, that orchestra leaders are a homogeneous class. Some of them only act as orchestra leaders, a few of whom employ more than one orchestra at a time. When the leader is not with his orchestra, he employs a sub-leader as his substitute. Others work only part-time in this capacity, accepting whatever engagements they can find, and work as sidemen or sub-leaders the rest of the

time. Still others work as orchestra leaders part-time and are regularly employed outside of the music industry. While the majority of leaders' engagements are in the club date field, they also seek engagements outside of it, either in the single or steady date field. Obviously there is a great deal of fluidity in the industry. Very few orchestra leaders employ their own orchestras full-time. The normal practice is for an orchestra leader first to secure an engagement, determine how many sidemen will be needed, and then employ them through the union hiring hall.

Most engagements are secured through booking agents, who since 1936 have been regulated by the Federation and its local unions, because during the depression booking agents took advantage of the job shortages in the music industry by charging exorbitant commissions. Under present union by-laws, union members are forbidden to accept engagements from booking agents not licensed by the union. The licensing agreements limit the commissions of booking agents to 10% for steady engagements and 15% for single engagements; and the agents must agree not to book non-union orchestras or musicians or to book orchestras for engagements at less than the union scale. In the past, engagements were also secured through the owners of catering halls and their employees, for which the caterer received a commission. Present union by-laws forbid this practice.

The Federation exercises rigid and monolithic control over much of the music industry, and this is especially true of Local 802 in the New York area. Within the jurisdiction of the Local, the closed shop is enforced by numerous by-laws, and pressure is placed upon orchestra leaders in various ways to induce them to become union members. For example, union members are not permitted to work in an orchestra in which a non-member leader either conducts or plays or which bears the name of a non-member.<sup>5</sup> A non-union orchestra leader may thus operate only if he hires

---

<sup>5</sup> Article IV, § 1(h) of the Local 802's by-laws.

sub-leaders to conduct. This is the situation of both Carroll and Peterson since their expulsion from the union. There are further restrictions which prevent union members from playing for proscribed or "unfair" persons, for instance an orchestra leader who has employed non-union musicians.

Having achieved a virtual closed shop, Local 802 regulates the club date field in great detail. Under its by-laws, member orchestra leaders are required to follow the "Price List Booklet", which is actually a codification of the standing resolutions of Local 802's Executive Board, and it governs all musical engagements not subject to any of the local's outstanding collective bargaining agreements. The booklet characterizes orchestra leaders as employees—"personnel managers"—and refers to the purchaser of music as the employer. It contains resolutions which establish the minimum number of sidemen required and the wage scales for the sidemen and sub-leaders in all engagements covered by it, providing with considerable specificity for variations according to the number of performances, the nature and length of the engagement, the establishment where it is played, and similar details.

The price list also sets a minimum for all covered engagements under the title 'Regulations for Establishing Leaders' Fees in Single Engagements.' These regulations, in fact, establish price floors because the orchestra leader is required to charge the music purchaser not less than the total of his "leader's fee", the sidemen's wages and other fees.<sup>6</sup> The leader's fee is a specific percentage above the union wage scale, graduated according to the number of musicians performing. Price floors are set for both single and steady engagements.

---

<sup>6</sup> The other required charges include an 8% addition, equivalent to social security costs, minimum charges for the carting of instruments and mileage fees for traveled to the engagement and the standard 10% surcharge for traveling engagements.



As indicated above, the price list is established unilaterally by Local 802. Under its by-laws the Executive Board is authorized to adopt resolutions establishing wages and prices, except where a meeting of the general membership votes on such price list resolutions. Once promulgated, the members must comply with such resolutions. There is no collective bargaining with orchestra leaders concerning the wage scales, price restrictions or other regulations established in the price list. Nor is there any collective bargaining with purchasers of music except, as discussed earlier, in the case of large-scale users of music who have standing agreements with Local 802 or with the Federation. Thus, in the club date field, which comprises most of the single engagements, and in many of the steady engagements, terms and conditions of employment, including wages, and minimum prices for orchestral engagements are determined by unilateral action of the union.

Enforcement of the regulations promulgated by the Executive Board is achieved by requiring orchestra leaders to report to Local 802 and by insistence upon the use of the Federation's "Form B" contract. This contract form, characterizing orchestra leaders as employees, was adopted by the Federation in 1941, and is the only engagement contract which a member is permitted to sign. The by-laws also provide that such contracts must be submitted for approval to the local union before the performance. Local 802, however, has relaxed these rules for single engagements by accepting an assurance either by telephone, by letter or by a report in person that the agreement with the purchaser complies with all union regulations and provides for payment of the sidemen according to the union wage scale. It insists, in addition, that all engagements as orchestra leaders first be approved by the Executive Board. In order further to assure compliance with the Price List, Local 802 employs "business representatives" who attend engagements to make certain that all regulations are being obeyed.



In order to protect the job market for local musicians against the encroachments of musicians and orchestra leaders who do not normally operate in the area, the Federation has instituted additional regulations for traveling engagements, which are those played by orchestras and members outside of the jurisdiction of their respective local unions. Formerly such engagements were sought to be curtailed by a 10% traveling surcharge which orchestra leaders were required to pay to the Federation.

After this court held that the tax violated § 302 of the Taft-Hartley Act, *Cutler v. American Federation of Musicians*, 316 F.2d 546 (2 Cir.) cert. denied 375 U.S. 941 (1963), the Federation adopted a price differential plan. The new by-laws require a traveling orchestra to charge, for steady engagements, 10% more than the minimum fee for a local orchestra and, for single engagements, 10% more than the minimum price of either its home local or of the local in whose territory it is playing, whichever is greater. Orchestra leaders performing steady traveling engagements are barred from accepting any single engagements anywhere until after the steady engagement has been completed; and at the termination of the initial engagement, they are also barred from accepting a succeeding steady engagement in the invaded territory.

In addition to inhibiting traveling orchestras, the Federation also discourages the travel of its members by various restrictions on the importing of musicians by a local orchestra leader. Although musicians are privileged as a matter of right to transfer their membership from one local to another, provided that they do not compete for jobs in the new area for three months after their transfer, the emphasis of the Federation's regulations is strongly placed upon maintaining a protected job market for the members of each local and thereby assuring the strength of the Federation's local unions.

The appellants, who claim to be representative of a class of orchestra leaders, contend that the foregoing practices and regulations of the Federation and of Local 802 violate the Sherman Act in the following respects:

(a) they fix the minimum prices which may be charged for orchestral engagements;

(b) they require that orchestral engagements be played by the minimum number of sidemen which the union establishes;

(c) they impose territorial restrictions on the operations of orchestra leaders and sidemen;

(d) they establish a monopoly in the music industry;

(e) they require all employees to use, for orchestral engagements, a written form of contract provided by the union;

(f) they refuse to bargain with orchestra leader-employers about the terms and conditions of employment;

(g) they coerce orchestra leaders into becoming members of the union;

(h) they regulate the activities of booking agents with whom the orchestra leaders must deal; and

(i) they deny orchestra leaders the opportunity to accept engagements from caterers.

A threshold question is whether appellants do in fact represent a class under Rule 23(a), Fed. R. Civ. P., as well as themselves as individuals. Their claim is that they adequately represent the interests of the class of persons within the jurisdiction of Local 802 who devote all or almost all of their time to being orchestra leaders and, as such operate primarily in the club date field. The district judge ruled that the action could not be maintained as a true class action.

under Rule 23(a)(1)<sup>7</sup>, and we are in accord with the decision on that issue.

In a true class action, all of the members of the class, including those absent, are bound by the judgment. See *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921); *Dickinson v. Burnham*, 197 F.2d 973 (2 Cir.), cert. denied 344 U.S. 875 (1952); *Giordano v. Radio Corporation of America*, 183 F.2d 558 (3 Cir. 1950). Therefore the interests of the affected persons must be carefully scrutinized to assure due process of law for the absent members. See *Hansberry v. Lee*, 311 U.S. 32 (1940). Since all members of the class are to be bound by the judgment, diverse and potentially conflicting interests within the class are incompatible with the maintenance of a true class action.

A spurious class action under Rule 23(a)(3), however, does not bindingly adjudicate the rights of members of the class who do not come before the court. *Nagler v. Admiral Corp.*, 248 F.2d 319, 327 (2 Cir. 1957); *Dickinson v. Burnham*, *supra* at 979; *California Apparel Creators v. Wieder*, 162 F.2d 893, 896-897 (2 Cir.), cert. denied, 332 U.S. 816 (1947); *York v. Guaranty Trust Co.*, 143 F.2d 503, 529 (2 Cir. 1944), reversed on other grounds, 326 U.S. 99 (1945).

Although Rule 23(a) requires that the parties suing on behalf of the class insure the adequate representation of all

---

<sup>7</sup> Rule 23(a), Fed. R. Civ. P. in pertinent part provides:

"If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

• • • • •

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

members of the class without distinguishing between true and spurious class actions, the *res judicata* distinction between the two is vital. A much stricter standard for determining the adequacy of representation should obtain where there are non-intervenors who would be bound by the judgment. See *Oppenheimer v. F. J. Young & Co.*, 144 F.2d 387, 390 (2 Cir. 1944); Cf. *York v. Guaranty Trust Co.*, *supra* at 528, n. 52 ("As the suit comes within Rule 23(a)(3), so that a judgment will not be *res judicata* as to . . . [non-intervenors], there is no necessity for a searching inquiry concerning the adequacy of her representation of others in the class.")

It is apparent that the present case does not qualify as a true class action under Rule 23(a)(1). It was brought by orchestra leaders as a direct challenge to the unions' control in the music industry, but there is evidence that many orchestra leaders are willing members of the union and subscribe to its policies; and there was no evidence offered by the appellants that such a group did not exist. Indeed, the unions' price-fixing programs would assure those who are less successful and well-known of earning at least the union fee when they work instead of the lower sum they might get under free competition. The desire to protect their interests gives them the same motivation that generates most horizontal price-fixing arrangements. Similar economic benefits to orchestra leaders are inherent in other of the union's regulations, for example, the restrictions on traveling engagements. Thus appellants' representation cannot be said fairly to insure that the interests of these absent orchestra leaders will be protected. *Hansberry v. Lee*, *supra*, Cf. *Giordano v. Radio Corporation of America*, *supra* at 560. Consequently the judgment in this action can bind only the named defendants and the four individual plaintiffs before the court.

We are in agreement with the district court's conclusion that the question of whether the representation of appellants is adequate to support a spurious class action should

not be answered at this time. Such an action is actually no more than a permissive joinder device. *York v. Guaranty Trust Co.*, *supra*; *California Apparel Creators v. Wieder*, *supra*; *Nagler v. Admiral Corp.*, *supra*. "It stands as an invitation to others affected to join in the battle and an admonition to the court to proceed with proper circumspection in creating a precedent which may actually affect non-parties, even if not legally *res judicata* as to them. Beyond this, as we in common with other courts have pointed out, it cannot make the case of the claimed representatives stronger, or give them rights they would not have of their own strength, or affect legally the rights or obligations of those who do not intervene." (Footnote omitted). *All-American Airways v. Elder*, 209 F.2d 247, 248 (2 Cir. 1954). 3 Moore, Federal Practice ¶ 23.10 (1) (3). At the present time, nobody is attempting to intervene; until somebody does, it is not necessary to decide that issue.

Application of the Sherman Act to the activities of labor unions involves a balancing of conflicting Congressional policies. Many of the devices which labor unions are permitted to use to further the interests of workers are similar to those forbidden to businessmen by the anti-trust laws. It is, of course, settled that "labor unions are to some extent and in some circumstances subject to the [Sherman] Act . . ." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940). The history of the use of the anti-trust laws against labor unions and the resulting legislation passed by Congress make it clear that the Sherman Act's area of application in labor cases is now restricted to certain narrowly defined practices; the Norris-LaGuardia Act takes all "labor disputes", as therein defined, outside of the reach of the Sherman Act.<sup>8</sup>

<sup>8</sup> Although the statute is cast in terms of the federal courts' jurisdiction to grant injunctive relief, it also applies to criminal prosecutions under the anti-trust laws, *United States v. Hutcheson*, 312 U.S. 219, 234-235 (1941), and cases at law:



Appellants contend that this case comes within the rule of *Allen Bradley Co. v. Local 3*, 325 U.S. 797 (1945), which creates an exception to the immunity afforded the unions for those cases in which a labor union combines with businessmen to achieve a commercial restraint. See also *United States v. Employing Plasterers' Association*, 347 U.S. 186 (1954); *United Brotherhood of Carpenters and Joiners v. United States*, 330 U.S. 395 (1947); *United States v. Hutcheson*, 312 U.S. 219 (1941) (dictum). Cf. *Hunt v. Crumboch*, 325 U.S. 821 (1945), decided the same day as *Allen Bradley Co.* (holding a union exempt because there was no conspiracy with a business group); *Cedar Crest Hats, Inc. v. United Hatters Union*, 362 F.2d 322 (5 Cir. 1966); *Greenstein v. National Skirt and Sportswear Association, Inc.*, 178 F. Supp. 681 (S.D.N.Y. 1959), appeal dismissed 274 F.2d 430 (2 Cir. 1960). Under the appellants' view of this case, there is a conspiracy by the unions with "non-labor" groups to engage in practices which are unlawful, because they are in restraint of trade. But the facts do not support such a conclusion.

*Allen Bradley Co.* was a case involving a conspiracy between business men and a labor union to prevent goods produced out side of the New York area from being sold within that area. The purpose of this compact was to create a local business monopoly. For a union's activity to fall outside of the protection of the definition of a "labor dispute" in § 13 of the Norris-LaGuardia Act (see footnote 3, supra), it must be shown that there was a conspiracy with a "non-labor group". That principle was reaffirmed by the opinion of the Court in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Three members of the Court in a separate concurring opinion concluded that the trier could infer such a conspiracy from the fact of an industry-wide collective bargaining agreement which tended to achieve an unlawful restraint. See the concurring opinion 381 U.S. at 673. In *Pennington*, the claim was that the United Mine Workers had "entered into a conspiracy with the large [coal mine]

operators to impose the agreed-upon wage and royalty scales upon the smaller, nonunion operators, regardless of their ability to pay and regardless of whether or not the union represented the employees of these companies, all for the purpose of eliminating them from the industry, limiting production and preempting the market for the large, unionized operators." 381 U.S. at 664. It was for that reason that the union's wage agreement was not exempted from the anti-trust laws.

In the present case there is no evidence of a conspiracy between Local 802, or the Federation, and orchestra leaders to eliminate competitors, fix prices or achieve any other commercial restraint, nor was such a finding made by the district judge. Rather, the record establishes that all restraints were instituted unilaterally by the unions and acquiesced in by the orchestra leaders. Nor does the fact that the unions reached agreements with non-labor groups—booking agents, recording companies and others—place this case within the exception.

Nevertheless, there is a narrower ground upon which the legality of the unions' activities must be tested. If the unions coerced orchestra leaders with regard to a matter which is not a "term or condition of employment", they would not be exempt from the provisions of the Sherman Act, because the Norris-LaGuardia Act affords immunity from the impact of the anti-trust laws only for "labor disputes"; it does not provide a blanket exemption.

This rule is readily apparent from the Supreme Court's disposition of *Local Union No. 189 v. Jewel Tea Co.*, 381 U.S. 676 (1965), decided the same day as *Pennington*. In that case, the Meatcutters' and Butchers' Union sought to prevent any store in the Chicago area from selling meat except during the hours of 9:00 A.M. to 6:00 P.M. All members of a bargaining association of stores acceded to the union's demand except Jewel Tea Co. which held out. The union called a strike against it which thereby forced Jewel

Tea to acquiesce. On Jewel Tea's suit to void this condition in its contract with the union, the district court held that there was no evidence of a conspiracy between the union and the retailers' association to impose the restricted marketing hours on the company. The case thus came to the Supreme Court "stripped of any claim of a union-employer conspiracy against Jewel." 381 U.S. at 688. Mr. Justice White, announcing the decision of the Court, said that the marketing hours restriction would not have been immune if it had not been a mandatory subject of collective bargaining, which the Court held that it was. In a concurring opinion, Mr. Justice Goldberg, writing for himself and two other members of the Court, was in essential agreement with this position, but took issue with what he thought was Mr. Justice White's "narrow, confining view of what labor unions have a legitimate interest in preserving and thus bargaining about." 381 U.S. at 727. He conceded, however, that the "direct and overriding interest of unions in such subjects as wages, hours and other working conditions, which Congress has recognized in making them subjects of mandatory bargaining, is clearly lacking where the subject of the agreement is price-fixing and market allocation." 381 U.S. at 732-733.

These statements are applicable as well to the present case. Here, of course, since the unions do not bargain with orchestra leaders or with music purchasers in the club date field, the union's protective provisions do not, as in *Jewel Tea*, appear in agreements with employers. They are, instead, unilaterally adopted by the unions and complied with by the orchestra leaders because of the threats of retaliation present in the unions' by-laws. The policy considerations are, however, the same.

"[E]xemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws." *Local Union No. 189 v. Jewel Tea Co.*, *supra*, at 689 (White, J.). Thus, in the absence of an illegal conspiracy, mandatory subjects of

collective bargaining carry with them an exemption; the national labor policy demands that the parties be permitted freely to reach agreement on terms and conditions directly affecting the working man. See *Local 24 v. Oliver*, 358 U.S. 283 (1959). Cf. *United States v. American Federation of Musicians*, 47 F. Supp. 304 (N.D. Ill. 1942) aff'd per curiam 318 U.S. 741 (1943); *United States v. Carrozzo*, 37 F. Supp. 191 (N.D. Ill. 1941), aff'd per curiam sub nom. *United States v. International Hod Carriers*, 313 U.S. 539 (1941); *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91, 98-99 (1940). Indeed, neither management nor labor could refuse to bargain about such subjects. National Labor Relations Act §§ 8(a)(5), (b)(3), (d), 49 Stat. 452 (1935), as amended 29 U.S.C. §§ 158(a)(5), (b)(3), (d) (1959). On matters outside of the mandatory area, however, no such considerations govern because the national labor policy does not require management and labor to bargain about them.

In light of the foregoing we conclude that the unions' establishment of price floors on orchestral engagements constitutes a per se violation of the Sherman Act. The price of orchestral engagements is not a subject of such direct and overriding interest to the unions, as representatives of sidemen and sub-leaders, that it is a mandatory subject of collective bargaining; and the unions' representation of orchestra leaders, whom this court has held to be employers in the field under consideration, cannot serve as a basis for its establishment of uniform price floors. See *Los Angeles Meat & Provisions Drivers Union v. United States*, 371 U.S. 94 (1962); *United States v. Women's Sportswear Manufacturers' Association*, 336 U.S. 460 (1949); *Columbia River Packers Association, Inc. v. Hinton*, 315 U.S. 143 (1942); *Local 36 v. United States*, 177 F.2d 320 (9 Cir. 1949).

The arguments that musicians are interested in the prices charged by their employers, because they form the boundary of the wages they can expect to receive is not



persuasive because it would justify an invasion of the proper function of management, which, with few exceptions, would go beyond any balancing of the labor and anti-trust laws and effect the complete paralyzation of the latter. See *Hawaiian Tuna Packers, Ltd. v. International Longshoremen's Union*, 72 F. Supp. 562 (D. Haw. 1947). The same principle would support union-instigated price-fixing in any industry.

Appellees also argue, in justification, that historically many orchestra leaders have been financially irresponsible, and the only way to assure that sidemen will be paid is to make certain that orchestra leaders have profits. But, while the history of an industry has a bearing upon whether a subject is of direct interest to labor unions, see *Greenstein v. National Skirt & Sportswear Ass'n supra*; cf. *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203 (1964), such assurances that leaders will pay their sidemen can be achieved by means much less drastic than price fixing.

To be distinguished from the present action are cases like *Local 24 v. Oliver, supra*. There the union was permitted to compel a carrier to pay certain wages to its employees and also to pay a profitable rental to owners-drivers, who were independent contractors performing the same function as union members. The prices received by the owner-drivers were a term or condition of employment of the union members, because "an inadequate rental might mean the progressive curtailment of jobs through the withdrawal of more and more carrier owned vehicles from service." 358 U.S. at 293-94. Cf. *Milk Wagon Drivers' Union v. Lake Valley Products, Inc., supra*. Here, the attempt to establish price minima, when orchestra leaders do not actually perform with their orchestras cannot be justified on the ground that there is job or wage competition or any other economic interrelationship between them and other employees represented by the unions. See *Los Angeles Meat and Provisions Drivers Union v. United States*,



*supra* at 103. The establishment of price floors by union fiat may seem to be a different matter, however, when the orchestra leader actually performs with his orchestra. In that situation the services of a sub-leader would not be required and the leader may in this way save the wages he would otherwise have to pay. Consequently, he could make the services of his orchestra available at a lower price than could a non-performing leader.

The cases make it clear, however, that price-fixing generally is not only not a mandatory subject for collective bargaining but is one toward which union activity may not be directed without violating the anti-trust laws. The unions assert that in this case the price-fixing is essential to the mandatory subject of job protection, as it was in *Local 24 v. Oliver, supra*; but in that case the union members were faced with the probability that, if a particular minimum price were not charged as rent by the owner operators of the vehicles, the employee-drivers, who were members of the union, would have to accept substandard wages or see their jobs entirely "contracted out" by the employer.<sup>9</sup> The circumstances constituting a possible threat to the employment of sub-leaders or the displacement of a sideman in the present case are not at all comparable. Nor is there any authority for holding that an employer must bargain on a labor union's demand that the employer perform no work himself which an employee could do. Moreover, many leaders become so because of their skill and reputation in playing certain instruments and their performances with their orchestras enhance the demand for the orchestras and provide more work for employees rather than less as is the case of "contracting out." See *Fibreboard Paper Products*

<sup>9</sup> A labor union may insist, of course, that employers "contract out" no work which is otherwise performed by union members. *N.L.R.B. v. Adams Dairy, Inc.*, 379 U.S. 646 (1965), reversing 322 F.2d 553 (8 Cir. 1963); *Fibreboard Paper Products Corp. v. N.L.R.B.*, *supra*; *Town & Country Manufacturing Co. v. N.L.R.B.*, 316 F.2d 846 (5 Cir. 1963) enforcing 136 NLRB 1022 (1962).

*Corp. v. N. L. R. B.*, *supra* at pp. 220-225 (Stewart, J. Concurring.)

Issues quite different in nature from price-fixing are raised by the appellants concerning travel restrictions and employment quotas, because both are mandatory subjects of collective bargaining and reflect union interest in maintaining the job market. See *United States v. American Federation of Musicians*, *supra*; *United States v. Carrozzo*, *supra*. Cf. *Fibreboard Paper Products Corp. v. N.L.R.B.* *supra*. Moreover, local unions have a direct interest in protecting the job market for their workers, cf. *Rambusch Decorating Co. v. Brotherhood of Painters*, 105 F.2d 134 (2 Cir.), cert. denied 308 U.S. 587 (1939), so that a music purchaser, for example a recording company, cannot refuse to bargain on a union's demand that only musician-employees who belong to the local union be employed. Cf. *N.L.R.B. v. Bradley Washfountain Co.*, 192 F.2d 144, 154 (7 Cir. 1951); *N.L.R.B. v. Andrew Jergens Co.*, 175 F.2d 130, 134 (9 Cir.), cert. denied 338 U.S. 827 (1949) (Union shop held mandatory subject of collective bargaining.) In the present case, since the employers do not remain within the jurisdiction of any local when they are traveling, the only realistic way to achieve local security is through the enforcement of restrictions by the national union. See *Rambusch Decorating Co. v. Brotherhood of Painters*, *supra*. As neither the travel restrictions nor the employment quotas were instituted in furtherance of a conspiracy with a non-labor individual or group, they are immune under the Norris-LaGuardia Act.

Appellants' contention that the Federation is an unlawful monopoly involves the claim that its achievement of a closed shop violates the Sherman Act. A closed shop dispute, however, concerns a "term or condition of employment", and therefore is exempt. See *United States v. American Federation of Musicians*, *supra*. Cf. *N.L.R.B. v. Bradley Washfountain Co.*, *supra*; *N.L.R.B. v. Andrew Jergens Co.*, *supra*. As a union's pursuit of a closed shop is pro-

ected, the accomplishment of its objective cannot be declared to be a violation of the Sherman Act. See *Kolb v. Pacific Maritime Ass'n*, 141 F. Supp. 264 (N.D. Cal. 1956). See generally *Apex Hosiery Co. v. Leader*, *supra*; *United States v. Gold*, 115 F.2d 236 (2 Cir. 1940). Rather, the elimination of price competition based upon inequality of labor standards is a legitimate and recognized objective of any national labor organization. See *United Mine Workers v. Pennington*, *supra* at 666; *Apex Hosiery Co. v. Leader*, *supra* at 503; Cox, Labor and the Antitrust Laws—A Preliminary Analysis, 104 U. Pa. L. Rev. 252, 254-255 (1955).

The appellants also contend that the unions merely by requiring orchestra leaders to use their Form B contract violate the anti-trust laws. This contract serves primarily as a reporting device which enables them to insure against violations of wages scales and other regulations. The use of such a standardized contract, without more, does not under ordinary circumstances constitute an unreasonable restraint of trade; if there are specific provisions in it which do, the complaint should so allege. Of course, the contract form provided for the club date field must, consistently with this decision, omit any provision which would, in effect, constitute price-fixing.

The charges concerning the unions' refusal to bargain with orchestra leaders and their activities in putting pressure on them to become union members constitute allegations of prima facie violations of the National Labor Relations Act. See Labor Management Relations Act of 1947, 61 Stat. 140, adding §§ 8(b)(3) and 8(b)(4)(ii)(A), 29 U.S.C. §§ 158(b)(3), (b)(4)(ii)(A) (1959). Whether unfair labor practices were committed, however, must be considered in the first instance by the National Labor Relations Board on complaint of the General Counsel. The only question before us is whether the same practices also infringe the Sherman Act. We conclude that they do not. A labor union's refusal to deal has been held to be exempt in the absence of a conspiracy with businessmen. *Hunt v. Crum-*

*boch*, 325 U.S. 821 (1945). Moreover, the purpose behind the unions' action makes it apparent that there is no violation involved. Unlike *Hunt v. Crumboch*, *supra*, at 826, et seq. (dissenting opinions), refusal to bargain here is not aimed at eliminating a competitor from the product market, but rather at achieving uniformity of labor standards.

The exertion of pressure on orchestra leaders to join the union reflects a legitimate union concern for the closed shop and is not to be confused with cases in which labor unions have imposed membership upon employers who do not present job threats to union members. See, e.g., *Los Angeles Meat & Provision Drivers v. United States*, *supra*; *United States v. Fish Smokers' Trade Council, Inc.*, 183 F. Supp.227 (S.D.N.Y. 1960). The same orchestra leaders who are "employers" in the club date field are very often "employees" when they perform as sidemen or sub-leaders or when in other fields the purchaser of music is actually the employer. Moreover, even those orchestra leaders who, as employers in club dates, lead but never perform as players, are proper subjects for membership because they are in job competition with union sub-leaders; each time a non-union orchestra leader performs, he displaces a "union job" with a "non-union job." *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.*, *supra*. Although there might be no such justification in the case of one who managed an orchestra but who never performed as a leader or player, we need not reach that question since Judge Levet found that no significant pressure to become members has been exerted by the union on Carroll and Peterson, the two plaintiffs who manage orchestras but do not perform.

Union by-laws prohibit the members from accepting engagements with or making any payments to caterers. Whether such a regulation is exempt from the Sherman Act may depend upon the effect on the terms and conditions of union members' employment of the bookings with, and kickbacks to, caterers. But the appellants have not



shown that they were injured by the regulation. There is nothing in the record which tends to establish that the appellants suffered a loss or reduction in engagements or that they were confined to less profitable contracts because of their inability to deal with caterers. The appellants, therefore, lack standing to challenge the lawfulness of the regulation. Clayton Act § 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1959).<sup>10</sup>

The objection to the unions' regulation of booking agents fails for a like reason. Their proscription of booking agents who deal with non-union musicians is clearly exempt on the same ground as the maintenance of a closed shop. The unions, however, also establish ceilings on booking agents' commissions. These provisions might deny some orchestra leaders the opportunity to bid competitively for engagements offered by booking agents, but there is no proof that the appellants attempted to offer booking agents a higher commission or that they would do so if given the chance. Consequently they lack standing to raise this issue.

The judgment of the district court is affirmed except for the price-fixing charge. The case is remanded to the district court to fashion an order enjoining the unions from enforcing the price restrictions against the four appellants and for a determination of what damages, if any, they have suffered.

The resulting judgment should provide that no costs will be taxed against any of the parties.

FRIENDLY, Circuit Judge (concurring and dissenting):

Agreeing with so much of Judge Anderson's excellent opinion as affirms rulings of the District Court, I must dissent from the portion that reads for reversal I do this with hesitation since the line between those forms of union

---

<sup>10</sup> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . ."



activity that are permissible and those that run afoul of the antitrust laws is anything but bright. In my view, however, the majority have failed to take adequate account of characteristics of the business here before us that render it *sui generis*, as Judge Levet with the years of experience gained from handling this and related actions, see fn. 1 to the majority opinion, has so thoroughly appreciated.

If club dates were always or almost always handled by non-performing leaders who devoted themselves exclusively or mainly to that activity, I would agree that fixing a minimum spread between the price paid by the buyer and the expenses incurred by the seller was not a "legitimate object" of union activity within the shelter of §§ 6 and 20 of the Clayton Act read in the light of § 4 of the Norris-LaGuardia Act. Such cases, however, are simply a rather small point at one end of a spectrum. Beginning with the single sideman "leading" himself, this ranges through the sideman who picks up two or three engagements a year as leader of a larger group, the performer who spends a fair portion of his time as a leader, the musician who does nothing but lead, and the exclusive leader having several bands with engagements at the same time,<sup>1</sup> up to the few "leaders" who have ceased to lead at all. Obviously this means a higher degree of interchangeability in work functions and competition among union members for posts as leaders.<sup>2</sup>

---

<sup>1</sup> In all these categories the leader usually plays an instrument at least part of the time when he is leading.

<sup>2</sup> An exhibit showed that for the period April 1-December 31, 1960, 6589 of Local 802's 30,000 members acted as leaders for club dates. A group of 118 leaders each had from 51 to more than 200 engagements, and a second group of 208 had from 21 to 50. On the other hand, 2789 acted as leader only once, 3062 from 2 to 9 times, and 608 from 10 to 20. Although appellants regard these figures as showing that the first two groups stand apart from the others, they seem to me to show the contrary.

The provisions my brothers condemn as offending the Sherman Act is that a leader must obtain an extra fee—25% of his scale when he leads himself, 50% when he leads another, 75% when he leads two others, and 100% when he leads three or more others—plus 8% of the aggregate scale wages to cover social security and unemployment insurance taxes and bookkeeping. Taking the first case first, I fail to see why protecting the member who wants to make an extra charge of 25% when he assumes the additional burden of getting an engagement against being undercut by others willing to forgo it is not as legitimate a union objective as setting a differential for a sideman's playing more than one instrument or engaging in rehearsal. As the size of the band increases, the time and cost of obtaining engagements, picking the sidemen, and making sure they are on hand at the appointed time and place also grow. If the union wants to see that such services are compensated rather than have some members perform them without remuneration for their time, effort or out-of-pocket expenses, this objective does not cease to be "intimately connected with wages, hours and working conditions" and thereby without the protection from the antitrust laws afforded by the Clayton Act, see *Local 189, Amalgamated Meat Cutters Union v. Jewel Tea Co.*, 381 U.S. 676, 689-690, 85 S.Ct. 1596, 14 L.Ed.2d 640 (1965) (White, J.), either because we have held the leader to be an "employer" within § 302 of the Labor Management Relations Act, *Carroll v. American Federal of Musicians*, 295 F.2d 484, 486 (2 Cir. 1961); *Cutler v. American Federation of Musicians*, 316 F.2d 546 (2 Cir.), cert. denied, 375 U.S. 941, 84 S.Ct. 346, 11 L.Ed.2d 272 (1963), or because the arrangements between the leader and the father of the bride are not themselves within the national labor policy. The fact that the leader is in part an entrepreneur does not deprive the union of a legitimate interest in his earnings up to the point where his services both as a performing artist and as a

salesman and manager have been adequately compensated. Whether Local 189, Amalgamated Meat Cutters Union v. Jewel Tea Co., supra, ultimately comes to mean that employer-union agreements on mandatory subjects of collective bargaining are generally or are always exempt from the antitrust laws, to read that case as establishing that only such union activities enjoy exemption would be a serious misunderstanding. Where, as here, the union rule merely sets a floor under the price at which one union member may sell his services to customers in competition with others, the union needs no such special justification as it did in *Jewel Tea* for regulating what would ordinarily be management prerogatives of independent businessmen employing union members. See *Los Angeles Meat & Provision Drivers Union v. United States*, 371 U.S. 94, 103 and 104-108, 83 S.Ct. 162, 9 L.Ed.2d 150 (concurring opinion of Mr. Justice Goldberg) (1962); cf. *Local 24, Int'l Bhd. of Teamsters, etc. v. Oliver*, 358 U.S. 283, 79 S.Ct. 297, 3 L.Ed.2d 312 (1959). A different result might be warranted if the floor were set so high as to cover not merely compensation for the additional services rendered by a leader but entrepreneurial profit as well. But there has been no such showing here.

I would affirm the dismissal of the complaint.

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of January one thousand nine hundred and sixty-seven.

## PRESENT:

Hon. Henry J. Friendly,  
Hon. J. Joseph Smith,  
Hon. Robert P. Anderson,  
*Circuit Judges.*

Docket No. 30445

JOSEPH CARROLL, CHARLES PETERSON, Orchestra Leaders of Greater New York, and CHARLES TURECANO, as Treasurer,  
*Plaintiffs-Appellants,*

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, ET AL., *Defendants-Appellees.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed, except as to determination of the issue of price fixing and as to that the judgment be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court.

/s/ A. DANIEL FUSARO  
*Clerk*

[Identical judgment entered on January 30, 1967, in Docket No. 30446.]

## SUPREME COURT OF THE UNITED STATES

No. ———, October Term, 1966

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES  
AND CANADA, ET AL., *Petitioners,*

v.

JOSEPH CARROLL, ET AL.

**Order Extending Time To File Petition for Writ of Certiorari**

Upon Consideration of the application of counsel for petitioners,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 29th, 1967.

JOHN M. HARLAN, *Associate  
Justice of the Supreme Court  
of the United States.*

Dated this 26th day of April, 1967.



SUPREME COURT OF THE UNITED STATES

No. ———, October Term, 1966

JOSEPH CARROLL, ET AL., *Petitioners,*

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES  
AND CANADA, ET AL.

**Order Extending Time To File Petition for Writ of Certiorari**

Upon Consideration of the application of counsel for petitioners,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 29th, 1967.

JOHN M. HARLAN, *Associate  
Justice of the Supreme Court  
of the United States.*

Dated this 26th day of April, 1967.

SUPREME COURT OF THE UNITED STATES

Nos. 309 and 310, October Term, 1967

[Titles omitted]

Order Allowing Certiorari—October 9, 1967

The petitions for writs of certiorari are granted. The cases are consolidated and two hours are allotted for oral argument. The Chief Justice and Mr. Justice Marshall took no part in the consideration or decision of these petitions.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petitions shall be treated as though filed in response to such writs.



LIBRARY  
SUPREME COURT U.S.A.  
JUN 29 1967

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1967

No. **309**

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED  
STATES AND CANADA AND ASSOCIATED MUSICIANS OF  
GREATER NEW YORK LOCAL 802, ET AL., *Petitioners,*

v.

JOSEPH CARROLL ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

HENRY KAISER  
EUGENE GRESSMAN  
GEORGE KAUFMANN  
RONALD ROSENBERG  
1730 K Street, N.W.  
Washington, D. C.

*Of Counsel:*

*Attorneys for Petitioners*

EMANUEL DANNETT  
JEROME ADLER  
DAVID I. ASHE



## INDEX

	Page
Petition for a Writ of Certiorari	
Opinions Below .....	1
Jurisdiction .....	1
Questions Presented .....	2
Statutory Provisions Involved .....	2
Statement of the Case .....	2
Introduction .....	2
A. The Underlying Facts .....	3
B. The Proceedings Below .....	6
1. The District Court .....	6
2. The Court of Appeals .....	8
Reasons for Granting the Writ .....	9
I. The Court Below Has Decided a Question of General Importance in Conflict With Long-Established Precedent in This Court .....	9
II. The Decision Below, by Misconstruing the Holdings of This Court, Destroys the Right of Unions To Protect Employee Standards From Competition by Working Employers .....	12
Conclusion .....	19
Appendix A .....	1a
Appendix B .....	28a
Appendix C .....	83a



## CITATIONS

CASES:	Page
Allen Bradley v. Local 3, I.B.E.W., 325 U.S. 797 ..	7, 8, 10, 11
Apex Hosiery Co. v. Leader, 310 U.S. 469 .....	14
Bakery and Pastry Drivers v. Wohl, 315 U.S. 769 ....	12
Carroll v. A.F.M., 310 F. 2d 325 (C.A. 2) .....	6
Cedar Crest Hats v. United Hatters, 362 F. 2d 322 (C.A. 5) .....	11
Detroit Resilient Floor Decorators, Local 2265, 136 NLRB 769, <i>enfd.</i> 317 F. 2d 269 (C.A. 6) .....	13
Fibreboard Co. v. Labor Board, 379 U.S. 203 .....	16, 17
Hunt v. Crumboch, 325 U.S. 821 .....	10
Labor Board v. Borg-Warner, 356 U.S. 342 .....	13, 17
Lauf v. E. G. Shinner and Co., 303 U.S. 323 .....	16
Marine Cooks v. Panama S.S. Co., 362 U.S. 365 ....	16
Meat Cutters v. Jewel Tea, 381 U.S. 676 .....	8, 9, 10, 11, 12, 13, 14, 15
Meat Drivers Union v. United States, 371 U.S. 94 ...	7, 12
Milk Wagon Drivers v. Lake Valley Farm Products, 311 U.S. 91 .....	7, 12, 15, 18
Mine Workers v. Pennington, 381 U.S. 657 .....	8, 10, 11
N.L.R.B. v. Andrew Jergens Co., 175 F. 2d 130 (C.A. 9)	16
N.L.R.B. v. Bradley Washfountain Co., 192 F 2d 144 (C.A. 7) .....	16
Senn v. Tile Layers Union, 301 U.S. 476 .....	12, 16
Teamsters Union v. Oliver, 358 U.S. 283 ....	12, 14, 15, 16
United States v. A.F.M., 318 U.S. 743 .....	16
United States v. Hutcheson, 312 U.S. 219 .....	10, 11, 16
United States v. International Hod Carriers, etc., 313 U.S. 539 .....	16

# Index Continued

iii

STATUTES:	Page
Clayton Act, 38 Stat. 730, 15 U.S.C. 12, <i>et seq.</i> :	
Sec. 6 .....	2
Sec. 20 .....	2, 10
Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. 101, <i>et seq.</i> :	
Sec. 4 .....	2
Sec. 13 .....	2
Sherman Act, 26 Stat. 209, 15 U.S.C. 1, <i>et seq.</i> :	
Sec. 1 .....	2
MISCELLANEOUS:	
<i>Union Agreement Provisions</i> , Bulletin No. 686 United States Department of Labor, Bureau of Labor Statistics (1942) .....	17

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1967

---

No.

---

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED  
STATES AND CANADA AND ASSOCIATED MUSICIANS OF  
GREATER NEW YORK LOCAL 802, ET AL., *Petitioners*,

v.

JOSEPH CARROLL ET AL., *Respondents*.

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

---

**OPINIONS BELOW**

The opinion of the Court of Appeals for the Second Circuit is reported at 372 F.2d 155 and is reprinted in Appendix A, pp. 1a-27a, *infra*. The opinion of the District Court for the Southern District of New York is reported at 241 F. Supp. 865 and is reprinted in Appendix B, pp. 28a-82a, *infra*.

**JURISDICTION**

The judgment of the Court of Appeals was entered on January 30, 1967. On April 26, 1967, Mr. Justice Harlan entered an order extending the time to file a petition for *certiorari* to June 29, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED<sup>1</sup>

1. May union regulations, designed to preserve employee job and wage standards, be denied the labor exemption to the antitrust laws, although the union has not combined with any non-labor group in their enforcement?
2. May union regulations, which preserve employee wage standards by establishing the minimum compensation which an employer must receive for work performed in competition with its members, be declared unlawful under the Sherman Act on the theory that they deal with a nonmandatory subject of bargaining?

## STATUTORY PROVISIONS INVOLVED

This case involves § 1 of the Sherman Act, 26 Stat. 208, 15 U.S.C. § 1; §§ 6 and 20 of the Clayton Act, 38 Stat. 731 and 738, 15 U.S.C. § 17 and 29 U.S.C. § 52; and §§ 4 and 13 of the Norris-LaGuardia Act. 47 Stat. 70 and 73, 29 U.S.C. §§ 104 and 113. These are reprinted in pertinent part in Appendix C, pp. 83a-86a, *infra*.

## STATEMENT OF THE CASE

### INTRODUCTION

This case represents another effort to invoke the antitrust laws to prohibit union regulations designed to protect the jobs and wage standards of its employee-members. The Court of Appeals, with Judge Friendly dissenting, has held that petitioner unions may not determine the price which their member, a musician known as the leader, must charge to the purchaser of

---

<sup>1</sup>If *certiorari* is granted, petitioners will also argue the following question: Did the Court of Appeals properly decide that leaders in the musical club-date field are employers?

the music on certain engagements known as "club dates". The Court below so held, although the leader, whom it denominated the employer of the musicians, was found to be a member of a labor group and thus properly subject to unionization. As we shall show herein, that decision, which destroys a historic practice of fundamental economic importance to professional musicians, is an abrupt departure from this Court's precedents governing the relationship between union activity and the antitrust laws, and particularly the right of unions to protect their members against job and wage competition from working independent contractors.

#### **A. The Underlying Facts.**

The regulations invalidated by the Court below involve musical engagements known as club dates, which are social engagements such as weddings, confirmations, and commencements. Normally, the purchaser of the music (the father of the bride, organizational social chairman, etc.) approaches a musician with a request for a specified number of instrumentalists at a particular time and place. This musician thereby becomes the "leader", who obtains the other musicians who perform the engagement. When the leader performs himself, he conducts the musicians and usually also plays an instrument. When the leader does not perform the engagement himself, the identical leading functions are fulfilled by a subleader (Finding 36, p. 35a, *infra*), and his instrument is played by a sideman (Finding 44, p. 36a, *infra*). It was stipulated, and the Courts below agreed, that the sidemen and the subleader are employees. There is controversy as to whether the leader is an employee or an employer on



club dates;<sup>2</sup> but both Courts below held that even if the leader is an employer, he is, for the purposes of antitrust laws, a member of a "labor group" properly subject to unionization. (Pp. 23a; 71a-72a, *infra*). This conclusion was based on the District Court's elaborate findings of job and wage competition and other economic interrelationship between musicians who perform as leaders on club dates and other musicians, admittedly employees, represented by petitioner unions. Only a few musicians in the club-date field are full-time leaders. A considerable number of musicians act only occasionally as leaders and act as sidemen the rest of the time, competing with each other and with the full-time leaders for engagements.<sup>3</sup>

---

<sup>2</sup> The Court of Appeals, citing earlier cases involving some of the same parties as in the present case, asserted that all leaders are employers in the club-date field (P. 6a, *infra*). However, it was previously decided only that the plaintiffs and other leaders who perform in the same manner, are employers; this was the position of plaintiffs herein. It has throughout been the unions' position that the purchaser of the music rather than the leader is the employer. As the pretrial order herein shows, both parties assumed that all other leaders in the club-date field were employees. (See e.g. Par. 8(a) and (b), Appendix to Appellant's Brief in the Court below, unnumbered volume, p. 91, hereafter cited as "App.") The District Court found it unnecessary to make a finding on this issue, properly considering the critical issue to be whether the leaders are members of a "labor group" as to which their employer status would not be determinative. (P. 67a, *infra*) For that reason, we do not rely on the Court of Appeals' error on this point as a separate ground for granting *certiorari*, but preserve the issue for review in the event that *certiorari* is granted. See P. 2, n.1, *supra*.

<sup>3</sup> Also significant is the mobility of employment in the music industry generally. Musicians who perform as leaders in the club-date field also play as leaders or sidemen in other parts of the music industry where the leader is concededly an employee, while musicians who perform regularly in these other fields also work as leaders, subleaders, and sidemen in the club-date field when they are not otherwise engaged. (Finding 29, P. 33a, *infra*).

The impact of the leaders' working on employee jobs was described as follows by the District Court:

"\* \* \* when one of the plaintiffs personally led his band he occupied a job that was a potential position for a subleader. When a plaintiff played an instrument as well as conducted, he filled a slot that was a potential job for a sideman and also displaced a subleader. In displacing sidemen and subleaders from potential jobs, plaintiffs engaged in job competition with them.

"As a consequence of this relationship, the practices of plaintiffs when they lead and play must have a vital effect on the working conditions of the non-leader members of the union. If they undercut the union wage scale or do not adhere to union regulations regarding hours or other working conditions when they perform, they will undermine these union standards. They would put pressure on the union members they compete with to correspondingly lower their own demands."<sup>4</sup>

In order to prevent such undermining of union standards, petitioner Local 802 adopted the regulations which were invalidated below. These regulations require the leader to charge the purchaser of the music a minimum price which is not less than the aggregate of the minimum compensation payable to sidemen and leaders. (Finding 79, p. 46a, *infra*).<sup>5</sup>

<sup>4</sup> Pp. 68a-69a, *infra*, footnote omitted. These conclusions were based on findings 31-45, Pp. 34a-36a, *infra*.

<sup>5</sup> The leader's basic compensation is 25% to 100% above the wages payable to sidemen, depending upon the number of musicians playing the engagement. Finding No. 74, Pp. 44a-45a, *infra*. The leader has traditionally received double the sidemen's scale as his minimum compensation in almost all areas of the music industry, including, *e.g.*, television, radio, and phonograph recordings, where the leader was found to be an employee. In addition to this

## B. The Proceedings Below.

### 1. The District Court.

This case arises out of two complaints brought by orchestra leader members of defendant American Federation of Musicians of the United States and Canada and its New York affiliate, Local No. 802.<sup>6</sup> The first complaint was filed on July 29, 1960; the second was filed on December 15, 1960. On May 22, 1961, they were consolidated and joined with two other cases (not arising under the antitrust laws) brought by the original plaintiffs. However, by stipulation, the issues in the other two cases were tried first and the record there made incorporated in this case.<sup>7</sup>

The complaints attacked numerous practices of defendants in all phases of the music industry. Following a lengthy trial, the District Court on May 17, 1965, issued its decision dismissing the complaint in its

---

basic fee the leader must also be paid as part of his minimum scale compensation on club dates a sum equal to 8% (it was initially fixed at 7%) of the scale wages of the leader and the sidemen. The purpose of the 8% is to reimburse the orchestra leader for his out-of-pocket expenses for social security, unemployment insurance, and bookkeeping. (Stipulated Facts 19-23; App. 72-73).

<sup>6</sup> The individual defendants, and petitioners here are officers of defendant unions. The respondents are two of the original plaintiffs, Joseph Carroll and Charles Peterson, and two intervenors, Marty Levitt and Ben Cutler. The other plaintiffs withdrew in the course of the District Court proceedings. Since the filing of the suits, Carroll and Peterson were expelled from defendant unions but for reasons unrelated to this litigation. See Findings No. 4 and No. 5, pp. 29a-30a, *infra*.

<sup>7</sup> Several motions were filed by plaintiffs for preliminary injunction on the antitrust complaints. The District Court granted one such motion on October 16, 1962, but the Court of Appeals reversed. *Carroll v. A.F.M.*, 310 F. 2d 325 (C.A. 2).

entirety. The Court made comprehensive findings carefully annotated to the transcript of the trial record and the stipulations of the parties. The Court introduced its discussion of the antitrust issues by pointing out that under *Allen Bradley Co. v. Local 3, I.B.E.W.*, 325 U.S. 797, the "unions could not, 'consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services'. Id. at 808". (P. 65a, *infra*) It then examined prior decisions of this Court to determine the meaning of the term "non-labor group" and concluded that the criterion used in the decisions "was the presence of job or wage competition or some other economic interrelationship affecting legitimate union interest between the union members and the independent contractors". (Pp. 65a-66a, *infra*) The Court then addressed its attention to whether the plaintiffs were a labor or non-labor group. Pp. 67a-70a, *infra*. Based on his findings, described above, pp. 4-5 *supra*; he concluded that they were a "labor group." He thus determined that under *Meat Drivers v. United States*, 371 U.S. 94 and *Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91, that it was lawful to compel them to join the unions. Turning his attention to the legality of the price lists, he found them to be justified by the competition between leaders and sidemen and subleaders and therefore lawful, citing *inter alia*, *Teamsters Union v. Oliver*, 358 U.S. 283. Finally, finding no evidence in the record to indicate that the price lists were established as part of a conspiracy with "non-labor groups to create business monopolies and control the marketing of goods and services", he declared *Allen Bradley Co. v. Local 3, I.B.E.W.*, 325 U.S. 797 to be inapplicable.



The complaint's allegations that defendants had violated the antitrust laws by other activities were also considered and dismissed.

## 2. The Court of Appeals.

The Court of Appeals did not disturb the District Court's findings of fact,<sup>8</sup> and, with a single exception, it affirmed the District Court's dismissal of the complaint. Of particular significance is the Court's rejection of plaintiffs' claim that they could not be required to be union members:

"Even those orchestra leaders who, as employers in club dates, lead but never perform as players, are proper subjects for membership because they are in job competition with union sub-leaders; each time a non-union orchestra leader performs, he displaces a 'union job' with a 'non-union job.' " (P. 23a, *infra*.)

However, the Court held that it was unlawful for the unions to fix the minimum price which the leader must charge to the purchaser of the music in the club-date field. It agreed with the District Court that the defendants had not combined with a non-labor group to fix prices, and thus rejected plaintiff's principal contention that the unions' conduct came within *Allen Bradley Co. v. Local 3, I.B.E.W.*, 325 U.S. 797, and *Mine Workers v. Pennington*, 381 U.S. 657. (Pp. 14a-16a, *infra*). However, the Court decided that the price regulations were invalid under *Meat Cutters v. Jewel Tea*, 381 U.S. 676. Without noting that these regulations were directed solely at members of a labor group—the leaders—the Court applied to them the standard

<sup>8</sup> There are, however, two or three statements of fact in the Court of Appeals' opinion which are not based on the findings and which appear to be contrary to the record. One of these, which the Court of Appeals thought to be material, is described at n. 14, *infra*.



for measuring the legality of agreements between unions and non-labor groups which it understood had been established by *Jewel Tea*. It was the majority's view that *Jewel Tea* held such an agreement to be protected by the labor exemption to the antitrust laws only if it deals with a mandatory subject of bargaining. On that assumption, and bearing heavily on the fact that petitioners' regulations governed "prices", the Court held that they did not deal with a mandatory bargaining subject but rather constituted price-fixing, and were a *per se* violation of the Sherman Act. Judge Friendly dissented, saying *inter alia* that it "would be a serious misunderstanding" to read *Jewel* as holding that only union agreements on mandatory subjects of bargaining are exempt from the antitrust laws. "Where, as here, the union rule merely sets a floor under the price at which one union member may sell his services to customers in competition with others, the union needs no such special justification as it did in *Jewel Tea* for regulating what would ordinarily be management prerogatives of independent business men employing union members." (P. 27a, *infra*)

### REASONS FOR GRANTING THE WRIT

#### I. The Court Below Has Decided a Question of General Importance in Conflict with Long-Established Precedent in This Court.

Despite its express finding that leaders are a labor group, properly the subject of unionization, the Court of Appeals held that petitioners' internal regulations establishing a minimum price which the leader-member must charge the purchaser of the music violate the anti-trust laws. That decision is contrary to an unbroken

line of decisions in which this Court has held union activities to be exempt from the antitrust laws unless undertaken in combination with a non-labor group. In *United States v. Hutcheson*, 312 U.S. 219, it was held:

“So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.” 312 U.S. at 232. (Emphasis added.)

*Hutcheson* was reaffirmed in *Allen Bradley Co. v. Local 3, I.B.E.W.*, 325 U.S. 797 at 807 and in *Hunt v. Crumboch*, 325 U.S. 821, 825, although liability was found in *Allen Bradley* because the union had participated in a conspiracy with businessmen which violated the antitrust laws. The foregoing language from *Hutcheson* was quoted with approval in *Mine Workers v. Pennington*, 381 U.S. 657, 662. In *Mine Workers* and its companion case, *Meat Cutters v. Jewel Tea*, 381 U.S. 676 this Court was divided on the issue of what agreements between labor unions and non-labor groups, if any, remained exempt under the antitrust laws. But the necessity of some form of agreement or combination between labor and non-labor groups as a predicate for a Sherman Act violation was a common premise of all the opinions written on that occasion. Plainly, the *Jewel Tea* case, on which the Court below relied, did not overrule the earlier holdings that a union can only violate the antitrust laws when it acts in combination with non-labor groups, for in *Jewel* the ultimate issue was stated to be whether the agreement between the unions and the Jewel Tea Co. was exempt from the

antitrust laws. See *e.g.* 381 U.S. at 688-89 (opinion of Mr. Justice White).<sup>9</sup> Our understanding of the law as it remains after *Pennington* and *Jewel* is confirmed by *Cedar Crest Hats v. United Hatters, etc.*, 362 F. 2d 322, where the Fifth Circuit said:

"Our reading of the Supreme Court decisions in *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797 and the more recent cases of *United Mine Workers of America v. Pennington*, 381 U.S. 657 and *Local Union No. 189, Amalgamated Meat Cutters, etc. v. Jewel Tea Co.*, 381 U.S. 676, convinces us that in order for union activity to constitute a violation of antitrust laws in the circumstances here presented, there must be a combination of union and non-union business groups to create a monopoly, resulting in a restraint of trade or interstate commerce." 362 F. 2d at 326.

We submit that the Court of Appeals' decision is so plainly contrary to the precedents in this Court that the grant of *certiorari* becomes most compelling. Moreover, review should be granted to correct the Second Circuit's failure to understand, as the Fifth Circuit so clearly has, that *Jewel Tea* did not alter the central meaning of the labor exemption to the antitrust laws. The decision below, by depriving union regulations directed only to a labor group of this exemption, threatens to revive antitrust challenges to unilateral union practices which *Hutcheson* and subsequent decisions have hitherto been thought to preclude.

---

<sup>9</sup> The Court below treated Mr. Justice White's opinion as the authoritative statement of what *Jewel* decided. It should be pointed out, however, that the basis on which Mr. Justice Douglas and those who joined him would have found liability, was that the multi-employer agreement between the unions and the chain stores violated the Sherman Act under *Allen Bradley*. See 381 U.S. at 735-736.

## II. The Decision Below, by Misconstruing the Holdings of This Court, Destroys the Right of Unions To Protect Employee Standards From Competition by Working Employers.

Even if, contrary to 25 years of authority in this Court, independent union activities are now to be subject to the same test as agreements between unions and non-labor groups, review of the decision below would be necessary. For the Court below has nullified the right of unions to protect their employee members from the evasion of union wage standards by competition from working employers, a right vouchsafed by this Court's decisions in *Milk Wagon Drivers v. Lake Valley Farm Products*, 311 U.S. 91, and reaffirmed in *Bakery and Pastry Drivers v. Wohl*, 315 U.S. 769; *Teamsters Union v. Oliver*, 358 U.S. 283; *Meat Drivers Union v. United States*, 371 U.S. 94, 103; *Cf. Senn v. Tile Layers Union*, 301 U.S. 476. To achieve this destructive result, the Court below not only misconceived those precedents, particularly *Oliver*; it discovered in *Meat Cutters v. Jewel Tea*, *supra*, a novel and far-reaching limitation on the labor exemption to the antitrust laws. The Court read *Jewel* to have held that the labor exemption applies only to a matter which is a mandatory subject of bargaining under the National Labor Relations Act (Pp. 16a-18a, *infra*), a view which would severely inhibit collective bargaining between all unions and employers. But we submit, in agreement with Judge Friendly, who dissented below, that this is a "serious misunderstanding" of *Jewel Tea*.<sup>10</sup> When this Court held that a party may not

<sup>10</sup> The majority below referred to certain language in Mr. Justice White's opinion as requiring this interpretation. However, Mr. Justice White and those who joined him did not purport to resolve this question—which was not necessary for decision of the case. They said only that they "seriously doubt" that the labor exemption applies to an agreement over a non-mandatory subject of bargaining. 381 U.S. at 689.



lawfully insist upon agreement with respect to a non-mandatory subject of bargaining, it was careful to point out that this "does not mean that bargaining is to be confined to the statutory subjects". *Labor Board v. Borg-Warner Corp.*, 356 U.S. 342, 349. Indeed, such mutual voluntary agreements often promote the objectives of the national labor policy by extending the areas of cooperation between employers and unions, achieving joint solutions to problems which are properly matters of common concern. Yet unless and until the decision below is reversed, it will stand as an authoritative warning to unions and employers that they experiment at their peril with respect to any subjects regarding which the statute does not compel them to bargain.<sup>11</sup>

The dangerous implications of the Court of Appeals' interpretation of *Jewel* are aggravated by that Court's narrow view of the scope of mandatory bargaining subjects. Perhaps the critical sentence in its opinion was, "The cases make it clear, however, that price-fixing generally is not only a mandatory subject for collective bargaining but is one toward which union activity may not be directed without violating the anti-

---

<sup>11</sup> Even in one of its most restrictive decisions, the National Labor Relations Board has expressed its awareness "that the subject matter of bargaining must reflect the changing conditions of industrial society and the changing responsibilities of labor and management". *Detroit Resilient Floor Decorators, Local 2265*, 136 NLRB 769, 772, enforced 317 F. 2d 269 (C.A. 6).



trust laws.”<sup>12</sup> Pp. 19a-20a, *infra*. But Mr. Justice White explained in *Jewel Tea* that the “crucial determinant is not the form of the agreement—e.g., prices or wages—but its relative impact on the product market and the interests of union members.” 381 U.S. at 690, n. 5.

It is of special significance for present purposes that Justice White illustrated that point by reference to *Teamsters Union v. Oliver*, 358 U.S. 283. “In *Oliver*, the disputed clause of the employer-union agreement was “in form a scheme fixing prices for the supply of leased vehicles”. 381 U.S. at 690, n. 5. Nevertheless, it was held to be a mandatory subject of bargaining, because it “was designed ‘to protect the negotiated wage scale against the possible undermining through diminution of the owner’s wages for driving which might result from a rental which did not cover his operating costs.’” *Id.* The design of petitioners’ regulations establishing a minimum compensation for the leader is identical. That compensation is based on his own wage plus his costs, consisting of the total of the sidemen’s wages, social security taxes and book-keeping expenses. See Statement, p. 5 *supra*. Any diminution of that total amount would mean a reduction in the leader’s wage for performing below union scale.

---

<sup>12</sup> This case can be decided on the basis of existing precedents defining the labor exemption. But it is a separate issue whether, the labor exemption aside, the union regulations violate the Sherman Act. Compare *Jewel Tea*, 381 U.S. at 693 (opinion of White, J.). The Court below disposed of that issue adversely to petitioners almost in passing; focusing on the word “price” it declared the regulations to be *per se* violative of the Sherman Act. In our view however, the matter is by no means so clear, and while not discussed in this petition as an additional reason for granting the writ, is encompassed in our questions presented. Cf. *Apex Hosiery Co. v. Leader*, 310 U.S. 469.

Since the performing leader is in direct competition with employee-subleaders, the result would be, in the District Court's words, an "obvious downward pressure on the wages of subleaders". (P. 73a, *infra*.)<sup>13</sup> The Court of Appeals itself appreciated this potential consequence, (p. 19a, *infra*) but in concentrating, contrary to *Jewel's* teaching, on the form of the regulation, lost sight of its substance.<sup>14</sup> *Oliver* is thus controlling even on the view that the labor exemption applies only to agreements dealing with mandatory bargaining subjects.

Nor can the result below be justified by the supposed absence of "any authority for holding that an employer must bargain on a labor union's demand that an employer perform no work himself which an employee could do". (P. 20a, *infra*.) We believe that there is

---

<sup>13</sup> While recognizing the situation to be different, the District Court also found enforcement of the regulations to be necessary to preserve employee wage standards where the leader does not perform. See pp. 73a-74a, *infra*. If the regulation is to be measured by the standards established for union-employer agreements in *Jewel Tea*, that finding is entitled to substantial weight. See 381 U.S. at 694-697 (Opinion of Mr. Justice White.)

<sup>14</sup> The Court below asserted that "many leaders . . . enhance the demand for the orchestras and provide more work for employees." App. A, p. 20a, *infra*. There are no findings or evidence to support this statement. But there is a more fundamental objection to the Court of Appeals' reasoning. A union's practice is protected from the antitrust laws—and deals with a mandatory subject of bargaining—if it is designed "to protect lawful employee interests against what is believed, *rightly or wrongly*, to be 'a scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards.' *Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91-99." *Teamsters Union v. Oliver*, 358 U.S. 283 (emphasis supplied.)

such authority,<sup>15</sup> but in any event numerous compelling analogies (aside from *Oliver*) are close at hand. It has been held to be lawful for unions to protect their jobs against the competition of employees of other employers, foreign<sup>16</sup> and domestic,<sup>17</sup> of the members of other unions<sup>18</sup> or of no unions at all<sup>19</sup> and even of inanimate technological devices.<sup>20</sup> Clearly, a practice is no less a term or condition of employment because it protects the same jobs against competition from working employers.

The regulations involved in this case, like those in *Oliver*, regulate the compensation which the employer

---

<sup>15</sup> We submit that there is such authority.

In the leading case of *Senn v. Tile Layers Union*, 301 U.S. 476, this Court affirmed a decision of the Supreme Court of Wisconsin which had held that a dispute over a demand that the employer not work at the trade is a "labor dispute" within the meaning of the Wisconsin Labor Code. At the next Term, this Court held that a strike for the closed shop was also a labor dispute under the Wisconsin Act, stating that the subject of the controversy was "indistinguishable" from that in *Senn*; *Lauf v. E. G. Shinner and Co.*, 303 U.S. 323, 328. The Court in *Lauf* then stated that the definition of labor dispute in the Norris-LaGuardia Act "does not differ materially from that above quoted from the Wisconsin Labor Code \* \* \*", 303 U.S. at 329. By equating the definitions of "labor dispute" of the Wisconsin Labor Code and the Norris-LaGuardia Act in an opinion which reaffirmed that a strike to prevent an employer from competing with his employees came within the former definition, the Court came very close indeed to holding that it was a dispute under the Norris-LaGuardia Act as well.

<sup>16</sup> *Marine Cooks v. Panama S.S. Co.*, 362 U.S. 365.

<sup>17</sup> *Fibreboard Co. v. Labor Board*, 379 U.S. 203.

<sup>18</sup> *United States v. Hutcheson*, 312 U.S. 219.

<sup>19</sup> *United States v. A.F.M.*, 318 U.S. 743; *N.L.R.B. v. Bradley Washfountain Co.*, 192 F. 2d 144 (C.A. 7); *N.L.R.B. v. Andrew Jergens Co.*, 175 F. 2d 130 (C.A. 9).

<sup>20</sup> *United States v. A.F.M.*, *supra*; *United States v. International Hod Carriers, etc.*, 313 U.S. 539.

must receive, rather than forbidding him from working at all. But the Court's observation that the latter method of dealing with employer competition would not be a mandatory subject of bargaining, expands the direct impact of its decision to the many collective bargaining agreements which either forbid or regulate the performance of employee jobs by employers or their representatives.<sup>21</sup> This industrial experience not only strengthens the claim of such provisions to be mandatory subjects of bargaining, see *Fibreboard Paper Products v. Labor Board*, 379 U.S. 203, 213-214, but increases the importance of this case, because it jeopardizes such agreements under the antitrust laws and implies that a strike to obtain them would be unlawful under *Labor Board v. Borg-Warner, supra*. With one stroke, the Court below has thereby deprived unions of all forms of protection against job and wage competition from working employers. Under its decision unions would not only be forbidden from establishing the minimum compensation which such employers or independent contractors must receive—which is the immediate result of the decision below—but would also be barred from insisting that they not compete for employee jobs.

---

<sup>21</sup> "In order to maintain employment opportunities of union members and to maintain union wage-and-hour standards, many agreements limit the performance of production work by foremen and employers and regulate the number of foremen and firm members who may work. These provisions are inserted to prevent persons who are not subject to the terms of the agreement from doing work which the union believes should be done by its members." *Union Agreement Provisions*, Bulletin No. 686 United States Department of Labor, Bureau of Labor Statistics (1942). Such provisions are "grist in the mills of the arbitrators". Cf. *Fibreboard, supra*, 379 U.S. at 214. See the cases collected at para. 117.339 of the Labor Arbitration Reports published by the Bureau of National Affairs.



This would have a devastating effect on workers in all callings where employees may be subjected to job and wage competition of working employers or independent contractors. Because of the inherent mobility of the American economy, this includes most trades in which the capital requirements for entry are small and the employee income depends on his own labor and skills. The impact of the decision below is particularly severe because petitioners and other unions have relied on the decisions of this Court which have uniformly sustained union regulations designed to preserve the wage standards of "employees" against erosion by such competition, since *Milk Wagon Drivers v. Lake Valley Farm Products Corp.*, 311 U.S. 91.<sup>22</sup>

These severe, practical consequences are, we submit, themselves sufficient to warrant review of the decision below. But they do not stand alone in any evaluation of the importance of this case. The holding that only agreements on mandatory bargaining subjects are protected by the labor exemption affects countless agreements between labor and management which contain provisions as to which neither was obliged to bargain; and, as we have sought to show, threatens to paralyze growth in the bargaining process itself.

Most serious, however, is the Court's withdrawal of the labor exemption from independent union action undertaken without agreement or other combination

---

<sup>22</sup> It is paradoxical that the occasion for these sweeping restrictions is an opinion wherein it is also decided—in accord with the same precedents—that leaders are properly subject to unionization because they compete for jobs with the union's employee members. Of course, as *Lake Valley*, *supra*, illustrates, the very purpose of such organization is to prevent the employers from competing below union standards.



with any non-labor group. The precise consequences of this radical departure from principles which had been settled for a quarter of a century cannot now be foreseen. But the history of labor-management relations teaches that contending parties are quick to seize any weapon that comes to hand, justifying the prophecy that the decision below, unless promptly disapproved, will invite much further litigation and will jeopardize or destroy hitherto unchallenged practices developed by unions to preserve the jobs and wage standards of their members.

### CONCLUSION

By reason of the foregoing this Petition for Certiorari should be granted.

Respectfully submitted,

HENRY KAISER  
EUGENE GRESSMAN  
GEORGE KAUFMANN  
RONALD ROSENBERG

1730 K Street, N.W.  
Washington, D. C.

*Attorneys for Petitioners*

*Of Counsel:*

EMANUEL DANNETT  
JEROME ADLER  
DAVID I. ASHE

**APPENDIX A**

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Nos. 75 and 76

September Term, 1966

(Argued November 28, 1966

Decided January 30, 1967)

Docket Nos. 30445 and 30446

JOSEPH CARROLL, CHARLES PETERSON and CHARLES TURE-  
CAMO, as Treasurer, Orchestra Leaders of Greater New  
York,

*Plaintiffs-Appellants*

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES  
AND CANADA, HERMAN D. KENIN, as President of said  
Federation, STANLEY BALLARD, as Secretary of said Fed-  
eration, and GEORGE V. CLANCY, as Treasurer of said  
Federation, ASSOCIATED MUSICIANS OF GREATER NEW  
YORK, LOCAL 802, and AL MANUTI, as President of Local  
802, MAX L. ARONS, as Secretary of Local 802 and HI  
JAFFE, as Treasurer of Local 802,

*Defendants-Appellees*

Before FRIENDLY, SMITH and ANDERSON, Circuit Judges.  
Appeal from a judgment dismissing the two complaints  
in a consolidated class action, charging the defendants with  
violations of the anti-trust laws, in the United States Dis-  
trict Court for the Southern District of New York, Richard  
H. Levet, J. Affirmed except as to determination of issue of  
price-fixing on which the judgment is reversed and re-  
manded.

Godfrey P. Schmidt, Esq., New York City  
New York, for Plaintiffs-Appellants

Emanuel Dannett, Esq., New York City, New York (McGoldrick, Dannett, Horowitz & Golub, Attorneys for Appellees American Federation of Musicians of the United States and Canada, Herman D. Kenin, Stanley Ballard and George V. Clancy; Ashe & Rifkin, Attorneys for Appellees Associated Musicians of Greater New York, Local 802, Al Manuti, Max Arons and Hy Jaffe; Henry Kaiser, Esq., Jerome H. Adler, Esq., David I. Ashe, Esq., George Kaufmann, Esq., and Eugene Mittelman, Esq., on the brief) for Defendants-Appellees

ANDERSON, Circuit Judge:

Plaintiffs-appellants are orchestra leaders, who in a series of suits over the past several years, have challenged the legality of numerous activities and regulations of the appellees.<sup>1</sup> The present actions instituted by appellants, Peterson and Carroll, in which Ben Cutler and Marty Levitt were allowed to intervene, as claimed class actions on behalf of themselves and as representatives of other orchestra leaders, charged the American Federation of Musicians and its New York affiliate, Associated Musicians of Greater New York, Local 802, with nine separate violations of the anti-

---

<sup>1</sup> Carroll v. Associated Musicians, 206 F. Supp. 462 (S.D.N.Y. 1962) affirmed, 316 F.2d 574 (2 Cir. 1963); Cutler v. American Federation of Musicians, 211 F. Supp. 433 (S.D.N.Y. 1962); 316 F.2d 546 (2 Cir.), cert. denied 375 U.S. 941 (1963). By stipulation, the testimony in those actions is made a part of the record in this action.

Appellants' motions for preliminary injunctions were passed upon on appeal by this court in Carroll v. Associated Musicians, 284 F.2d 91 (2 Cir. 1960), affirming 183 F. Supp. 636 (S.D.N.Y. 1960); Carroll v. American Federation of Musicians, 295 F.2d 484 (2 Cir. 1961); and Carroll v. American Federation of Musicians, 310 F.2d 325 (2 Cir. 1962).

trust laws, none of which is protected by either the Clayton Act<sup>2</sup> or the Norris-LaGuardia Act.<sup>3</sup>

<sup>2</sup> Section 6 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 17 (1959) provides:

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purpose of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Section 20, of the Clayton Act, 38 Stat. 738 (1914), 29 U.S.C. § 52 (1959) provides:

"No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which there is no adequate remedy at law . . . And no such restraining order or injunction shall prohibit any person or persons [from striking, assembling, organizing, etc.] . . ."

<sup>3</sup> Section 4 of the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 104 (1959), provides:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons . . . from doing, whether singly or in concert, any of the following acts:

[striking, joining a labor union, giving strike benefits, lawfully aiding in a labor dispute, publicizing a dispute, assembling, etc.]"

"The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." Norris-LaGuardia Act § 13, 47 Stat. 73 (1932), 29 U.S.C. § 113(c) (1959).

The first complaint was filed in July 1960 and the other, brought to include a challenge to an increase in the musicians' wage scale adopted after the July suit was started, was filed in December, 1960. Both actions sought preliminary and permanent injunctive relief, as well as treble damages for alleged injuries. The district court, sitting without a jury, after a trial of five weeks, dismissed the complaints and entered judgment for the defendants. *Carroll v. American Federation of Musicians*, 241 F. Supp. 865 (S.D.N.Y. 1965). The appeal to this court presents the question of whether various practices of the unions violate the Sherman Act.<sup>4</sup>

The American Federation of Musicians, an affiliate of the AFL-CIO, consists of 683 local unions and has a membership of more than 260,000. Almost all of the musicians, in the United States, referred to in the trade as sidemen, and most of the orchestra leaders and sub-leaders, who act as substitute orchestra leaders, are members of the Federation or its locals. Local 802, with 30,000 members, has virtual control of labor in the music industry in the New York area. The appellants were members of Local 802 when this action was brought, but Carroll and Peterson have been expelled from membership since that date.

Essential to an understanding of the issues presented is a definition of terms and a description of the practices which distinguish the industry.

---

<sup>4</sup> 26 Stat. 209 et seq. (1890), 15 U.S.C. §§ 1 and 2 (1959):

Section 1:

- "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

Section 2: ●

- "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."



Musical engagements are generally classified as either "steady", those lasting for longer than one week, or "single", usually one day or one performance affairs but including all engagements lasting less than one week. The much sought after steady engagements are rare in comparison with the number of single engagements.

The predominant form of single engagement is the "club date", such as weddings, parties and dances, which provides employment for the largest number of musicians. Single engagements also include the "non-club date" field, consisting of television appearances or recording engagements, etc. The distinction between the kinds of single engagements is vital; the non-club date engagements are ordinarily governed by collective bargaining agreements concluded by the union and the "purchaser" of music. The same is usually true of the steady engagement field. Local 802 has collective bargaining agreements with the major users or "purchasers" of live music within its area such as recording companies, hotels, television and film producers, opera companies and theatres. These agreements treat the "purchaser" as the employer and the orchestra leader as its employee, little different from a sideman. Indeed, in this field such a characterization would ordinarily be justified, because in the recording industry, for example, in which all engagements are governed by such collective bargaining agreements, a regular employee of the recording company exercises general supervision over the orchestras hired. He selects the orchestra leader, who does the conducting and some arranging, hires the sidemen and determines their number, their instruments and the compositions to be played and exercises general control over the orchestra's performance. The recording company pays each musician, as well as the orchestra leader, individually and is responsible for the withholding of social security, federal and state taxes, as well as all bookkeeping. The practices are similar in most engagements covered by the union's collective bargaining agreements.

The club date field is entirely different in that it is not governed by collective bargaining agreements. Rather, the orchestra leader secures the engagement, either by himself or through booking agents, and negotiates directly with the music purchaser, usually for a flat price, and the responsibility for collecting the fee, paying the sidemen, withholding taxes and keeping records is his. His remuneration is the difference between his costs, primarily the wages of sidemen, and the amount received from the music purchaser. The district court assumed, without explicitly finding, that orchestra leaders are employers or independent contractors when operating in this field. In light of the fact that an orchestra leader working a club date is no different from any other independent contractor, who employs his own laborers, we conclude, as we have in other contexts in this litigation, see, e.g., *Cutler v. American Federation of Musicians*, 316 F.2d 546, 549 (2 Cir. 1963), affirming 211 F. Supp. 433, 445 (S.D.N.Y. 1962); *Carroll v. American Federation of Musicians*, 295 F.2d 484, 486 (2 Cir. 1961); *Carroll v. Associated Musicians*, 284 F.2d 91 (2 Cir. 1960), affirming 183 F. Supp. 636 (S.D.N.Y. 1960), that orchestra leaders are employers in the club date field.

It should not be inferred, however, that orchestra leaders are a homogeneous class. Some of them act only as orchestra leaders, a few of whom employ more than one orchestra at a time. When the leader is not with his orchestra, he employs a sub-leader as his substitute. Others work only part-time in this capacity, accepting whatever engagements they can find, and work as sidemen or sub-leaders the rest of the time. Still others work as orchestra leaders part-time and are regularly employed outside of the music industry. While the majority of leaders' engagements are in the club date field, they also seek engagements outside of it, either in the single or steady date field. Obviously there is a great deal of fluidity in the industry. Very few orchestra leaders employ their own orchestras full-time. The normal practice is for an orchestra leader first to secure an engagement, deter-

mine how many sidemen will be needed, and then employ them through the union hiring hall.

Most engagements are secured through booking agents, who since 1936 have been regulated by the Federation and its local unions, because during the depression booking agents took advantage of the job shortages in the music industry by charging exorbitant commissions. Under present union by-laws, union members are forbidden to accept engagements from booking agents not licensed by the union. The licensing agreements limit the commissions of booking agents to 10% for steady engagements and 15% for single engagements; and the agents must agree not to book non-union orchestras or musicians or to book orchestras for engagements at less than the union scale. In the past, engagements were also secured through the owners of catering halls and their employees, for which the caterer received a commission. Present union by-laws forbid this practice.

The Federation exercises rigid and monolithic control over much of the music industry, and this is especially true of Local 802 in the New York area. Within the jurisdiction of the Local, the closed shop is enforced by numerous by-laws, and pressure is placed upon orchestra leaders in various ways to induce them to become union members. For example, union members are not permitted to work in an orchestra in which a non-member leader either conducts or plays or which bears the name of a non-member.<sup>5</sup> A non-union orchestra leader may thus operate only if he hires sub-leaders to conduct. This is the situation of both Carroll and Peterson since their expulsion from the union. There are further restrictions which prevent union members from playing for proscribed or "unfair" persons, for instance an orchestra leader who has employed non-union musicians.

Having achieved a virtual closed shop, Local 802 regulates the club date field in great detail. Under its by-laws, member orchestra leaders are required to follow the "Price

<sup>5</sup> Article IV, § 1(h) of the Local 802's by-laws.

List Booklet", which is actually a codification of the standing resolutions of Local 802's Executive Board, and it governs all musical engagements not subject to any of the local's outstanding collective bargaining agreements. The booklet characterizes orchestra leaders as employees—"personnel managers"—and refers to the purchaser of music as the employer. It contains resolutions which establish the minimum number of sidemen required and the wage scales for the sidemen and sub-leaders in all engagements covered by it, providing with considerable specificity for variations according to the number of performances, the nature and length of the engagement, the establishment where it is played, and similar details.

The price list also sets a minimum for all covered engagements under the title "Regulations for Establishing Leaders' Fees in Single Engagements." These regulations, in fact, establish price floors because the orchestra leader is required to charge the music purchaser not less than the total of his "leader's fees", the sidemen's wages and other fees.<sup>6</sup> The leader's fee is a specific percentage above the union wage scale, graduated according to the number of musicians performing. Price floors are set for both single and steady engagements.

As indicated above, the price list is established unilaterally by Local 802. Under its by-laws the Executive Board is authorized to adopt resolutions establishing wages and prices, except where a meeting of the general membership votes on such price list resolutions. Once promulgated, the members must comply with such resolutions. There is no collective bargaining with orchestra leaders concerning the wage scales, price restrictions or other regulations established in the price list. Nor is there any collective bargaining with purchasers of music except, as discussed

---

<sup>6</sup> The other required charges include an 8% addition, equivalent to social security costs, minimum charges for the carting of instruments and mileage fees for travel to the engagement and the standard 10% surcharge for traveling engagements.



earlier, in the case of large scale users of music who have standing agreements with Local 802 or with the Federation. Thus, in the club date field, which comprises most of the single engagements, and in many of the steady engagements, terms and conditions of employment, including wages, and minimum prices for orchestral engagements are determined by unilateral action of the union.

Enforcement of the regulations promulgated by the Executive Board is achieved by requiring orchestra leaders to report to Local 802 and by insistence upon the use of the Federation's "Form B" contract. This contract form, characterizing orchestra leaders as employees, was adopted by the Federation in 1941, and is the only engagement contract which a member is permitted to sign. The by-laws also provide that such contracts must be submitted for approval to the local union before the performance. Local 802, however, has relaxed these rules for single engagements by accepting an assurance either by telephone, by letter or by a report in person that the agreement with the purchaser complies with all union regulations and provides for payment of the sidemen according to the union wage scale. It insists, in addition, that all engagements as orchestra leaders first be approved by the Executive Board. In order further to assure compliance with the Price List, Local 802 employs "business representatives" who attend engagements to make certain that all regulations are being obeyed.

In order to protect the job market for local musicians against the encroachments of musicians and orchestra leaders who do not normally operate in the area, the Federation has instituted additional regulations for traveling engagements, which are those played by orchestras and members outside of the jurisdiction of their respective local unions. Formerly such engagements were sought to be curtailed by a 10% traveling surcharge which orchestra leaders were required to pay to the Federation.

After this court held that the tax violated §302 of the Taft-Hartley Act, *Cutler v. American Federation of Musi-*



*cians*, 316 F.2d 546 (2 Cir.) cert. denied 375 U.S. 941 (1963), the Federation adopted a price differential plan. The new by-laws require a traveling orchestra to charge, for steady engagements, 10% more than the minimum fee for a local orchestra and, for single engagements, 10% more than the minimum price of either its home local or of the local in whose territory it is playing, whichever is greater. Orchestra leaders performing steady traveling engagements are barred from accepting any single engagements anywhere until after the steady engagement has been completed; and at the termination of the initial engagement, they are also barred from accepting a succeeding steady engagement in the invaded territory.

In addition to inhibiting traveling orchestras, the Federation also discourages the travel of its members by various restrictions on the importing of musicians by a local orchestra leader. Although musicians are privileged as a matter of right to transfer their membership from one local to another, provided that they do not compete for jobs in the new area for three months after their transfer, the emphasis of the Federation's regulations is strongly placed upon maintaining a protected job market for the members of each local and thereby assuring the strength of the Federation's local unions.

The appellants, who claim to be representative of a class of orchestra leaders, contend that the foregoing practices and regulations of the Federation and of Local 802 violate the Sherman Act in the following respects:

(a) they fix the minimum prices which may be charged for orchestral engagements;

(b) they require that orchestral engagements be played by the minimum number of sidemen which the union establishes;

(c) they impose territorial restrictions on the operations of orchestra leaders and sidemen;

- (d) they establish a monopoly in the music industry;
- (e) they require all employers to use, for orchestral engagements, a written form of contract provided by the union;
- (f) they refuse to bargain with orchestra leader-employers about the terms and conditions of employment;
- (g) they coerce orchestra leaders into becoming members of the union;
- (h) they regulate the activities of booking agents with whom the orchestra leaders must deal; and
- (i) they deny orchestra leaders the opportunity to accept engagements from caterers.

A threshold question is whether appellants do in fact represent a class under Rule 23(a), Fed. R. Civ. P., as well as themselves as individuals. Their claim is that they adequately represent the interests of the class of persons within the jurisdiction of Local 802 who devote all or almost all of their time to being orchestra leaders and, as such, operate primarily in the club date field. The district judge ruled that the action could not be maintained as a true class action under Rule 23(a)(1)<sup>7</sup>, and we are in accord with the decision on that issue.

<sup>7</sup> Rule 23(a), Fed. R. Civ. P. in pertinent part provides:

"If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

\* \* \* \*

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

In a true class action, all of the members of the class, including those absent, are bound by the judgment. See *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921); *Dickinson v. Burnham*, 197 F.2d 973 (2 Cir.), cert. denied 344 U.S. 875 (1952); *Giordano v. Radio Corporation of America*, 183 F.2d 558 (3 Cir. 1950). Therefore the interests of the affected persons must be carefully scrutinized to assure due process of law for the absent members. See *Hansberry v. Lee*, 311 U.S. 32 (1940). Since all members of the class are to be bound by the judgment, diverse and potentially conflicting interests within the class are incompatible with the maintenance of a true class action.

A spurious class action under Rule 23(a)(3), however, does not bindingly adjudicate the rights of members of the class who do not come before the court. *Nagler v. Admiral Corp.*, 248 F.2d 319, 327 (2 Cir. 1957); *Dickinson v. Burnham*, *supra* at 979; *California Apparel Creators v. Wieder*, 162 F.2d 893, 896-897 (2 Cir.), cert. denied, 332 U.S. 816 (1947); *York v. Guaranty Trust Co.*, 143 F.2d 503, 529 (2 Cir. 1944), reversed on other grounds, 326 U.S. 99 (1945).

Although Rule 23(a) requires that the parties suing on behalf of the class insure the adequate representation of all members of the class without distinguishing between true and spurious class actions, the res judicata distinction between the two is vital. A much stricter standard for determining the adequacy of representation should obtain where there are non-intervenors who would be bound by the judgment. See *Oppenheimer v. F. J. Young & Co.*, 144 F.2d 387, 390 (2 Cir. 1944); Cf. *York v. Guaranty Trust Co.*, *supra* at 528, n. 52 ("As the suit comes within Rule 23(a)(3), so that a judgment will not be res judicata as to . . . [non-intervenors], there is no necessity for a searching inquiry concerning the adequacy of her representation of others in the class.")

It is apparent that the present case does not qualify as a true class action under Rule 23(a)(1). It was brought by

orchestra leaders as a direct challenge to the unions' control in the music industry, but there is evidence that many orchestra leaders are willing members of the union and subscribe to its policies; and there was no evidence offered by the appellants that such a group did not exist. Indeed, the unions' price-fixing programs would assure those who are less successful and well-known of earning at least the union fee when they work instead of the lower sum they might get under free competition. The desire to protect their interests gives them the same motivation that generates most horizontal price-fixing arrangements. Similar economic benefits to orchestra leaders are inherent in other of the union's regulations, for example, the restrictions on traveling engagements. Thus appellants' representation cannot be said fairly to insure that the interests of these absent orchestra leaders will be protected. *Hansberry v. Lee*, *supra*. Cf. *Giordano v. Radio Corporation of America*, *supra* at 560. Consequently the judgment in this action can bind only the named defendants and the four individual plaintiffs before the court.

We are in agreement with the district court's conclusion that the question of whether the representation of appellants is adequate to support a spurious class action should not be answered at this time. Such an action is actually no more than a permissive joinder device. *York v. Guaranty Trust Co.*, *supra*; *California Apparel Creators v. Wieder*, *supra*; *Nagler v. Admiral Corp.*, *supra*. "It stands as an invitation to others affected to join in the battle and an admonition to the court to proceed with proper circumspection in creating a precedent which may actually affect non-parties, even if not legally *res judicata* as to them. Beyond this, as we in common with other courts have pointed out, it cannot make the case of the claimed representatives stronger, or give them rights they would not have of their own strength, or affect legally the rights or obligations of those who do not intervene." (Footnote omitted). *All-American Airways*

*v. Elderd*, 209 F.2d 247, 248 (2 Cir. 1954). 3 Moore, Federal Practice ¶23.10 (1) and (3). At the present time, nobody is attempting to intervene; until somebody does, it is not necessary to decide that issue.

Application of the Sherman Act to the activities of labor unions involves a balancing of conflicting Congressional policies. Many of the devices which labor unions are permitted to use to further the interests of workers are similar to those forbidden to businessmen by the anti-trust laws. It is, of course, settled that "labor unions are to some extent and in some circumstances subject to the [Sherman] Act . . ." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940). The history of the use of the anti-trust laws against labor unions and the resulting legislation passed by Congress make it clear that the Sherman Act's area of application in labor cases is now restricted to certain narrowly defined practices; the Norris-LaGuardia Act takes all "labor disputes", as therein defined, outside of the reach of the Sherman Act.<sup>8</sup>

Appellants contend that this case comes within the rule of *Allen Bradley Co. v. Local 3*, 325 U.S. 797 (1945), which creates an exception to the immunity afforded the unions for those cases in which a labor union combines with businessmen to achieve a commercial restraint. See also *United States v. Employing Plasterers' Association*, 347 U.S. 186 (1954); *United Brotherhood of Carpenters and Joiners v. United States*, 330 U.S. 395 (1947); *United States v. Hutcheson*, 312 U.S. 219 (1941) (dictum). Cf. *Hunt v. Crumboch*, 325 U.S. 821 (1945), decided the same day as *Allen Bradley Co.* (holding a union exempt because there was no conspiracy with a business group); *Cedar Crest Hats, Inc. v. United Hatters Union*, 362 F.2d 322 (5 Cir. 1966); *Green-*

---

<sup>8</sup> Although the statute is cast in terms of the federal courts' jurisdiction to grant injunctive relief, it also applies to criminal prosecutions under the anti-trust laws, *United States v. Hutcheson*, 312 U.S. 219, 234-235 (1941), and cases at law.



*stein v. National Skirt and Sportswear Association, Inc.*, 178 F. Supp. 681 (S.D.N.Y. 1959), appeal dismissed 274 F.2d 430 (2 Cir. 1960). Under the appellants' view of this case, there is a conspiracy by the unions with "non-labor" groups to engage in practices which are unlawful, because they are in restraint of trade. But the facts do not support such a conclusion.

*Allen Bradley Co.* was a case involving a conspiracy between businessmen and a labor union to prevent goods produced outside of the New York area from being sold within that area. The purpose of this compact was to create a local business monopoly. For a union's activity to fall outside of the protection of the definition of a "labor dispute" in §13 of the Norris-LaGuardia Act (see footnote 3, *supra*), it must be shown that there was a conspiracy with a "non-labor group". That principle was reaffirmed by the opinion of the Court in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Three members of the Court in a separate concurring opinion concluded that the trier could infer such a conspiracy from the fact of an industry-wide collective bargaining agreement which tended to achieve an unlawful restraint. See the concurring opinion 381 U.S. at 673. In *Pennington*, the claim was that the United Mine Workers had "entered into a conspiracy with the large [coal mine] operators to impose the agreed-upon wage and royalty scales upon the smaller, nonunion operators, regardless of their ability to pay and regardless of whether or not the union represented the employees of these companies, all for the purpose of eliminating them from the industry, limiting production and pre-empting the market for the large, unionized operators." 381 U.S. at 664. It was for that reason that the union's wage agreement was not exempted from the anti-trust laws.

In the present case there is no evidence of a conspiracy between Local 802, or the Federation, and orchestra leaders to eliminate competitors, fix prices or achieve any other

commercial restraint, nor was such a finding made by the district judge. Rather, the record establishes that all restraints were instituted unilaterally by the unions and acquiesced in by the orchestra leaders. Nor does the fact that the unions reached agreements with non-labor groups—booking agents, recording companies and others—place this case within the exception.

Nevertheless, there is a narrower ground upon which the legality of the unions' activities must be tested. If the unions coerced orchestra leaders with regard to a matter which is not a "term or condition of employment", they would not be exempt from the provisions of the Sherman Act, because the Norris-LaGuardia Act affords immunity from the impact of the anti-trust laws only for "labor disputes"; it does not provide a blanket exemption.

This rule is readily apparent from the Supreme Court's disposition of *Local Union No. 189 v. Jewel Tea Co.*, 381 U.S. 676 (1965), decided the same day as *Pennington*. In that case, the Meatcutters' and Butchers' Union sought to prevent any store in the Chicago area from selling meat except during the hours of 9:00 A.M. to 6:00 P.M. All members of a bargaining association of stores acceded to the union's demand except Jewel Tea Co., which held out. The union called a strike against it which thereby forced Jewel Tea to acquiesce. On Jewel Tea's suit to void this condition in its contract with the union, the district court held that there was no evidence of a conspiracy between the union and the retailers' association to impose the restricted marketing hours on the company. The case thus came to the Supreme Court "stripped of any claim of a union-employer conspiracy against Jewel." 381 U.S. at 688. Mr. Justice White, announcing the decision of the Court, said that the marketing hours restriction would not have been immune if it had not been a mandatory subject of collective bargaining, which the Court held that it was. In a concurring opinion, Mr. Justice Goldberg, writing for himself and two

other members of the Court, was in essential agreement with this position, but took issue with what he thought was Mr. Justice White's "narrow, confining view of what labor unions have a legitimate interest in preserving and thus bargaining about." 381 U.S. at 727. He conceded, however, that the "direct and overriding interest of unions in such subjects as wages, hours and other working conditions, which Congress has recognized in making them subjects of mandatory bargaining, is clearly lacking where the subject of the agreement is price-fixing and market allocation." 381 U.S. at 732-733.

These statements are applicable as well to the present case. Here, of course, since the unions do not bargain with orchestra leaders or with music purchasers in the club date field, the unions' protective provisions do not, as in *Jewel Tea*, appear in agreements with employers. They are, instead, unilaterally adopted by the unions and complied with by the orchestra leaders because of the threats of retaliation present in the unions' by-laws. The policy considerations are, however, the same.

"[E]xemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws." *Local Union No. 189 v. Jewel Tea Co.*, *supra*, at 689 (White, J.). Thus, in the absence of an illegal conspiracy, mandatory subjects of collective bargaining carry with them an exemption; the national labor policy demands that the parties be permitted freely to reach agreement on terms and conditions directly affecting the working man. See *Local 24 v. Oliver*, 358 U.S. 283 (1959). Cf. *United States v. American Federation of Musicians*, 47 F. Supp. 304 (N.D. Ill. 1942) *aff'd per curiam* 318 U.S. 741 (1943); *United States v. Carrozzo*, 37 F. Supp. 191 (N.D. Ill. 1941), *aff'd per curiam sub nom. United States v. International Hod Carriers*, 313 U.S. 539 (1941); *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91, 98-99 (1940). Indeed, neither management

nor labor could refuse to bargain about such subjects. National Labor Relations Act §§8(a)(5), (b)(3), (d), 49 Stat. 452 (1935), as amended 29 U.S.C. §§158(a)(5), (b)(3), (d) (1959). On matters outside of the mandatory area, however, no such considerations govern because the national labor policy does not require management and labor to bargain about them.

In light of the foregoing, we conclude that the unions' establishment of price floors on orchestral engagements constitutes a per se violation of the Sherman Act. The price of orchestral engagements is not a subject of such direct and overriding interest to the unions, as representatives of sidemen and sub-leaders, that it is a mandatory subject of collective bargaining; and the unions' representation of orchestra leaders, whom this court has held to be employers in the field under consideration, cannot serve as a basis for its establishment of uniform price floors. See *Los Angeles Meat & Provisions Drivers Union v. United States*, 371 U.S. 94 (1962); *United States v. Women's Sportswear Manufacturers' Association*, 336 U.S. 460 (1949); *Columbia River Packers Association, Inc. v. Hinton*, 315 U.S. 143 (1942); *Local 36 v. United States*, 177 F.2d 320 (9 Cir. 1949).

The arguments that musicians are interested in the prices charged by their employers, because they form the boundary of the wages they can expect to receive is not persuasive because it would justify an invasion of the proper function of management, which, with few exceptions, would go beyond any balancing of the labor and anti-trust laws and effect the complete paralyzation of the latter. See *Hawaiian Tuna Packers, Ltd. v. International Longshoremen's Union*, 72 F. Supp. 562 (D. Haw. 1947). The same principle would support union-instigated price-fixing in any industry.

Appellees also argue, in justification, that historically many orchestra leaders have been financially irresponsible,



and the only way to assure that sidemen will be paid is to make certain that orchestra leaders have profits. But, while the history of an industry has a bearing upon whether a subject is of direct interest to labor unions, see *Greenstein v. National Skirt & Sportswear Ass'n*, *supra*; cf. *Fibre-board Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203 (1964), such assurances that leaders will pay their sidemen can be achieved by means much less drastic than price fixing.

To be distinguished from the present action are cases like *Local 24 v. Oliver*, *supra*. There the union was permitted to compel a carrier to pay certain wages to its employees and also to pay a profitable rental to owner-drivers, who were independent contractors performing the same function as union members. The prices received by the owner-drivers were a term or condition of employment of the union members, because "an inadequate rental might mean the progressive curtailment of jobs through the withdrawal of more and more carrier owned vehicles from service." 358 U.S. at 293-294. Cf. *Milk Wagon Drivers' Union v. Lake Valley Products, Inc.*, *supra*. Here, the attempt to establish price minima, when orchestra leaders do not actually perform with their orchestras, cannot be justified on the ground that there is job or wage competition or any other economic interrelationship between them and other employees represented by the unions. See *Los Angeles Meat and Provision Drivers Union v. United States*, *supra* at 103. The establishment of price floors by union fiat may seem to be a different matter, however, when the orchestra leader actually performs with his orchestra. In that situation the services of a sub-leader would not be required and the leader may in this way save the wages he would otherwise have to pay. Consequently, he could make the services of his orchestra available at a lower price than could a non-performing leader.

The cases make it clear, however, that price-fixing generally is not only not a mandatory subject for collective



bargaining but is one toward which union activity may not be directed without violating the anti-trust laws. The unions assert that in this case the price-fixing is essential to the mandatory subject of job protection, as it was in *Local 24 v. Oliver, supra*; but in that case the union members were faced with the probability that, if a particular minimum price were not charged as rent by the owner operators of the vehicles, the employee-drivers, who were members of the union, would have to accept substandard wages or see their jobs entirely "contracted out" by the employer.<sup>9</sup> The circumstances constituting a possible threat to the employment of sub-leaders or the displacement of a sideman in the present case are not at all comparable. Nor is there any authority for holding that an employer must bargain on a labor union's demand that the employer perform no work himself which an employee could do. Moreover, many leaders become so because of their skill and reputation in playing certain instruments and their performances with their orchestras enhance the demand for the orchestras and provide more work for employees rather than less as is the case of "contracting out." See *Fibreboard Paper Products Corp. v. N. L. R. B., supra*, at pp. 220-225 (Stewart, J. Concurring).

Issues quite different in nature from price-fixing are raised by the appellants concerning travel restrictions and employment quotas, because both are mandatory subjects of collective bargaining and reflect union interest in maintaining the job market. See *United States v. American Federation of Musicians, supra*; *United States v. Carrozzo, supra*. Cf. *Fibreboard Paper Products Corp. v. N. L. R. B., supra*. Moreover, local unions have a direct interest in pro-

---

<sup>9</sup> A labor union may insist, of course, that employers "contract out" no work which is otherwise performed by union members. *N.L.R.B. v. Adams Dairy, Inc.*, 379 U.S. 646 (1965), reversing 322 F.2d 553 (8 Cir. 1963); *Fibreboard Paper Products Corp. v. N.L.R.B., supra*; *Town & Country Manufacturing Co. v. N.L.R.B.*, 316 F.2d 846 (5 Cir. 1963) enforcing 136 NLRB 1022 (1962).

protecting the job market for their workers, cf. *Rambusch Decorating Co. v. Brotherhood of Painters*, 105 F.2d 134 (2 Cir.), cert. denied 308 U.S. 587 (1939), so that a music purchaser, for example a recording company, cannot refuse to bargain on a union's demand that only musician-employees who belong to the local union be employed. Cf. *N.L.R.B. v. Bradley Washfountain Co.*, 192 F.2d 144, 154 (7 Cir. 1951); *N.L.R.B. v. Andrew Jergens Co.*, 175 F.2d 130, 134 (9 Cir.), cert. denied 338 U.S. 827 (1949) (Union shop held mandatory subject of collective bargaining.) In the present case, since the employers do not remain within the jurisdiction of any local when they are traveling, the only realistic way to achieve local security is through the enforcement of restrictions by the national union. See *Rambusch Decorating Co. v. Brotherhood of Painters*, *supra*. As neither the travel restrictions nor the employment quotas were instituted in furtherance of a conspiracy with a non-labor individual or group, they are immune under the Norris-LaGuardia Act.

Appellants' contention that the Federation is an unlawful monopoly involves the claim that its achievement of a closed shop violates the Sherman Act. A closed shop dispute, however, concerns a "term or condition of employment", and therefore is exempt. See *United States v. American Federation of Musicians*, *supra*. Cf. *N.L.R.B. v. Bradley Washfountain Co.*, *supra*; *N.L.R.B. v. Andrew Jergens Co.*, *supra*. As a union's pursuit of a closed shop is protected, the accomplishment of its objective cannot be declared to be a violation of the Sherman Act. See *Kolb v. Pacific Maritime Ass'n*, 141 F. Supp. 264 (N.D. Cal. 1956). See generally *Apex Hosiery Co. v. Leader*, *supra*; *United States v. Gold*, 115 F.2d 236 (2 Cir. 1940). Rather, the elimination of price competition based upon inequality of labor standards is a legitimate and recognized objective of any national labor organization. See *United Mine Workers v. Pennington*, *supra* at 666; *Apex Hosiery Co. v. Leader*,

*supra* at 503; Cox, Labor and the Antitrust Laws—A Preliminary Analysis, 104 U. Pa. L. Rev. 252, 254-255 (1955).

The appellants also contend that the unions merely by requiring orchestra leaders to use their Form B contract violate the anti-trust laws. This contract serves primarily as a reporting device which enables them to insure against violations of wage scales and other regulations. The use of such a standardized contract, without more, does not under ordinary circumstances constitute an unreasonable restraint of trade; if there are specific provisions in it which do, the complaint should so allege. Of course, the contract form provided for the club date field must, consistently with this decision, omit any provision which would, in effect, constitute price-fixing.

The charges concerning the unions' refusal to bargain with orchestra leaders and their activities in putting pressure on them to become union members constitute allegations of prima facie violations of the National Labor Relations Act. See Labor Management Relations Act of 1947, 61 Stat. 140, adding §§8(b)(3) and 8(h)(4)(ii)(A), 29 U.S.C. §§158(b)(3), (b)(4)(ii)(A) (1959). Whether unfair labor practices were committed, however, must be considered in the first instance by the National Labor Relations Board on complaint of the General Counsel. The only question before us is whether the same practices also infringe the Sherman Act. We conclude that they do not. A labor union's refusal to deal has been held to be exempt in the absence of a conspiracy with businessmen. *Hunt v. Crumboch*, 325 U.S. 821 (1945). Moreover, the purpose behind the unions' action makes it apparent that there is no violation involved. Unlike *Hunt v. Crumboch*, *supra*, at 826, et seq. (dissenting opinions), refusal to bargain here is not aimed at eliminating a competitor from the product market, but rather at achieving uniformity of labor standards.

The exertion of pressure on orchestra leaders to join the union reflects a legitimate union concern for the closed shop and is not to be confused with cases in which labor unions have imposed membership upon employers who do not present job threats to union members. See, e.g., *Los Angeles Meat & Provision Drivers v. United States*, *supra*; *United States v. Fish Smokers' Trade Council, Inc.*, 183 F. Supp. 227 (S.D.N.Y. 1960). The same orchestra leaders who are "employers" in the club date field are very often "employees" when they perform as sidemen or sub-leaders or when in other fields the purchaser of music is actually the employer. Moreover, even those orchestra leaders who, as employers in club dates, lead but never perform as players, are proper subjects for membership because they are in job competition with union sub-leaders; each time a non-union orchestra leader performs, he displaces a "union job" with a "non-union job." *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.*, *supra*. Although there might be no such justification in the case of one who managed an orchestra but who never performed as a leader or player, we need not reach that question since Judge Levet found that no significant pressure to become members has been exerted by the union on Carroll and Peterson, the two plaintiffs who manage orchestras but do not perform.

Union by-laws prohibit the members from accepting engagements with or making any payments to caterers. Whether such a regulation is exempt from the Sherman Act may depend upon the effect on the terms and conditions of union members' employment of the bookings with, and kickbacks to, caterers. But the appellants have not shown that they were injured by the regulation. There is nothing in the record which tends to establish that the appellants suffered a loss or reduction in engagements or that they were confined to less profitable contracts because

of their inability to deal with caterers. The appellants, therefore, lack standing to challenge the lawfulness of the regulation. Clayton Act §4, 38 Stat. 731 (1914), 15 U.S.C. §15 (1959).<sup>10</sup>

The objection to the unions' regulation of booking agents fails for a like reason. Their proscription of booking agents who deal with non-union musicians is clearly exempt on the same ground as the maintenance of a closed shop. The unions, however, also establish ceilings on booking agents' commissions. These provisions might deny some orchestra leaders the opportunity to bid competitively for engagements offered by booking agents, but there is no proof that the appellants attempted to offer booking agents a higher commission or that they would do so if given the chance. Consequently they lack standing to raise this issue.

The judgment of the district court is affirmed except for the price-fixing charge. The case is remanded to the district court to fashion an order enjoining the unions from enforcing the price restrictions against the four appellants and for a determination of what damages, if any, they have suffered.

The resulting judgment should provide that no costs will be taxed against any of the parties.

FRIENDLY, Circuit Judge (concurring and dissenting);

Agreeing with so much of Judge Anderson's excellent opinion as affirms rulings of the District Court, I must dissent from the portion that reads for reversal I do this with hesitation since the line between those forms of union activity that are permissible and those that run afoul of the antitrust laws is anything but bright. In my view, however, the majority have failed to take adequate account of characteristics of the business here before us that render

---

<sup>10</sup> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . ."



it *sui generis*, as Judge Levett with the years of experience gained from handling this and related actions, see fn. 1 to the majority opinion, has so thoroughly appreciated.

If club dates were always or almost always handled by non-performing leaders who devoted themselves exclusively or mainly to that activity, I would agree that fixing a minimum spread between the price paid by the buyer and the expenses incurred by the seller was not a "legitimate object" of union activity within the shelter of §§ 6 and 20 of the Clayton Act read in the light of § 4 of the Norris-LaGuardia Act. Such cases, however, are simply a rather small point at one end of a spectrum. Beginning with the single sideman "leading" himself, this ranges through the sideman who picks up two or three engagements a year as leader of a larger group, the performer who spends a fair portion of his time as a leader, the musician who does nothing but lead, and the exclusive leader having several bands with engagements at the same time,<sup>1</sup> up to the few "leaders" who have ceased to lead at all. Obviously this means a higher degree of interchangeability in work functions and competition among union members for posts as leaders.<sup>2</sup>

The provisions my brothers condemn as offending the Sherman Act is that a leader must obtain an extra fee—25% of his scale when he leads himself, 50% when he leads another, 75% when he leads two others, and 100% when

---

<sup>1</sup> In all these categories the leader usually plays an instrument at least part of the time when he is leading.

<sup>2</sup> An exhibit showed that for the period April 1-December 31, 1960, 6589 of Local 802's 30,000 members acted as leaders for club dates. A group of 118 leaders each had from 51 to more than 200 engagements, and a second group of 208 had from 21 to 50. On the other hand, 2789 acted as leader only once, 3062 from 2 to 9 times, and 608 from 10 to 20. Although appellants regard these figures as showing that the first two groups stand apart from the others, they seem to me to show the contrary.

he leads three or more others—plus 8% of the aggregate scale wages to cover social security and unemployment insurance taxes and bookkeeping. Taking the first case first, I fail to see why protecting the member who wants to make an extra charge of 25% when he assumes the additional burden of getting an engagement against being undercut by others willing to forgo it is not as legitimate a union objective as setting a differential for a sideman's playing more than one instrument or engaging in rehearsal. As the size of the band increases, the time and cost of obtaining engagements, picking the sidemen, and making sure they are on hand at the appointed time and place also grow. If the union wants to see that such services are compensated rather than have some members perform them without remuneration for their time, effort or out-of-pocket expenses, this objective does not cease to be "intimately connected with wages, hours and working conditions" and thereby without the protection from the antitrust laws afforded by the Clayton Act, see *Local 189, Amalgamated Meat Cutters Union v. Jewel Tea Co.*, 381 U.S. 676, 689-690, 85 S.Ct. 1596, 14 L.Ed.2d 640 (1965) (White, J.), either because we have held the leader to be an "employer" within § 302 of the Labor Management Relations Act, *Carroll v. American Federal of Musicians*, 295 F.2d 484, 486 (2 Cir. 1961); *Cutler v. American Federation of Musicians*, 316 F.2d 546 (2 Cir.), cert. denied, 375 U.S. 941, 84 S.Ct. 346, 11 L.Ed.2d 272 (1963), or because the arrangements between the leader and the father of the bride are not themselves within the national labor policy. The fact that the leader is in part an entrepreneur does not deprive the union of a legitimate interest in his earnings up to the point where his services both as a performing artist and as a salesman and manager have been adequately compensated. Whether *Local 189, Amalgamated Meat Cutters Union v. Jewel Tea Co.*, supra, ultimately comes to mean that employer-union agreements on mandatory subjects of collective bargaining are generally or are always exempt from the antitrust

laws, to read that case as establishing that only such union activities enjoy exemption would be a serious misunderstanding. Where, as here, the union rule merely sets a floor under the price at which one union member may sell his services to customers in competition with others, the union needs no such special justification as it did in *Jewel Tea* for regulating what would ordinarily be management prerogatives of independent businessmen employing union members. See *Los Angeles Meat & Provision Drivers Union v. United States*, 371 U.S. 94, 103 and 104-108, 83 S.Ct. 162, 9 L.Ed.2d 150 (concurring opinion of Mr. Justice Goldberg) (1962); cf. *Local 24, Int'l Bhd. of Teamsters, etc. v. Oliver*, 358 U.S. 283, 79 S.Ct. 297, 3 L.Ed.2d 312 (1959). A different result might be warranted if the floor were set so high as to cover not merely compensation for the additional services rendered by a leader but entrepreneurial profit as well. But there has been no such showing here.

I would affirm the dismissal of the complaint.

**APPENDIX B**

U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

CARROLL et al. v. AMERICAN FEDERATION OF MUSICIANS OF UNITED STATES AND CANADA et al., Nos. 60-2939 and 60-4926, May 17, 1965

LEVET, District Judge:—The plaintiff-orchestra leaders claim that the defendants American Federation of Musicians of the United States and Canada ("Federation" or "AFM") and Associated Musicians of Greater New York Local 802 ("Local 802") have violated the antitrust laws. I have endeavored to categorize the multitude of alleged violations, making a sufficient number of Findings of Fact in each category to adequately define them. I have not found it either necessary or desirable to include every union regulation which might possibly be included in each category. The dispute in this case centers primarily on the applicable law and the interpretation to be given to the facts, rather than the facts themselves.

The court directed a consolidated trial in 60 Civil 2939 and 60 Civil 4926. The single set of Findings of Fact and Conclusions of Law relates to both actions.

Since the class suit was not sustained, this opinion relates exclusively to the plaintiffs in the action. Nevertheless, the court has found evidence presented as to other orchestra leaders who in certain respects are similarly situated to the plaintiffs relevant in making findings relating to some of plaintiffs' practices.

The parties stipulated that the testimony in 60 Civil 1169 and 60 Civil 4025 is part of the record in this case (1019-20). Consideration of damages was reserved for a time subsequent to the decision on liability.

¶ This case having been tried, the court, after considering the pleadings, evidence, exhibits, briefs and stipulations of the parties and the proposed findings of fact and conclusions of law, makes the Findings of Fact and Conclusions of Law listed below.<sup>1</sup>

## FINDINGS OF FACT

### I. THE PARTIES

#### A. *Plaintiffs*

1. Plaintiffs Joseph Carroll, Charles Peterson, Ben Cutler and Marty Levitt, at all times relevant herein, were and are orchestra leaders, and at the commencement of these actions were members of defendants AFM and Local 802. Neither Carroll nor Peterson is presently a member of defendant unions (Stipulated Fact 1).

2. Plaintiffs Charles Turecamo and Dan Terry have withdrawn from the action.

3. At all times relevant herein, plaintiff Peterson was an employee of corporations known as Charles Peterson Theatrical Productions, Inc. ("Peterson, Inc.") and Carlton M. Hub, Inc. ("Hub, Inc."). Peterson was the sole stockholder of Peterson, Inc. and now controls Hub, Inc. (1755, 1983-84). Peterson always handled his musical engagements through Peterson, Inc. until recently when he began to use Hub, Inc. to (1756, 1983, 1986, Exs. GB, GG, GD).

4. Plaintiff Peterson was expelled from the defendant unions for various reasons, including his failure to abide by the union minimum wage scale (2117-18; Exs. FR-FY).

---

<sup>1</sup> References to "Stipulated Fact" are to those stipulated facts set forth in paragraph 3 of the pre-trial order herein. References to a number, "Ex." followed by a number, and "Ex." followed by a letter, are to the stenographer's minutes, plaintiffs' exhibits and defendants' exhibits, respectively. References to "St. Min." followed by a number are to pages in the stenographer's minutes of the trial of 60 Civil 1169 and 4025, which, pursuant to stipulation is part of the record in this action. "F.F." indicate Findings of Fact.



5. Plaintiff Carroll was expelled from Federation for failing to furnish Local 38 of the Federation with information pertaining to an engagement which he performed in Westchester County. He was also expelled by Local 802 for violation of various of its By-Laws, including his failure to abide by Local 802's wage scales (Carroll v. Associated Musicians of Greater New York, Local 802, 52 LRRM 2950 [S.D.N.Y. 1963]).

6. There is no evidence that plaintiff Orchestra Leaders of Greater New York ("OLGNY") has in any way been damaged or aggrieved by any conduct of defendants or that it has any interest in these actions (see Stipulation of plaintiffs' counsel in letter to this court dated November 13, 1964).

7. Plaintiff Levitt performs services on club dates (577) and on steady engagements in hotels and ballrooms (564, 571).

8. Substantially all of plaintiff Cutler's services are performed in the club date field (2227). He has also made one or two recordings and appeared on one television program (2560; St. Min. 83-84; Exs. 310, DR). In the steady engagement field he has performed in hotels, restaurants and nightclubs (2227; St. Min. 70-71).

9. Plaintiff Peterson is primarily engaged in the club date single engagement field. He has also worked in concerts and in the steady engagement field in certain hotels and dance halls between 1945 and 1950 (1742-43; St. Min. 854-858).

10. Plaintiff Carroll is "almost exclusively" engaged in the club date single engagement field. He served as a leader in the steady engagement field at the Stork Club between 1945-48 (1425).

11. The plaintiffs in practicing their professions:

(a) maintain their own offices where they employ steady and/or part-time employees (567; St. Min. 71, 76-81, 258-59, 347, 360);

(b) acquire business as a result of their own contacts, reputations, and personal solicitations (567; St. Min. 78-79, 261-62, 360);

(c) engage in and pay for advertising (567; St. Min. 80-85, 87, 127-128, 261-262, 360) and prominently display their names wherever their engagements are played, thus indicating that the orchestra is, e.g., the Charles Peterson Orchestra (St. Min. 116, 260, 347).

12. Because of Carroll's and Peterson's expulsions from the union, they were thereafter precluded from actively taking part in their engagements either as conductors or instrumentalists (1777-79, 1936-37, 2039-44, 2110-12). (See F.F. XV.)

#### *B. The Defendants*

13. Defendant Local 802 is a labor union affiliated with the defendant Federation and with the AFL-CIO. The territorial jurisdiction of defendant Local 802 consists of the five boroughs of New York City and Nassau and Suffolk Counties (Ex. CJ, Section 6, p. 5; St. Min. 80-81, 453).

14. Local 802 has over 30,000 members. They perform musical services as conductors, instrumentalists, arrangers and copyists. Local 802 represents, and has traditionally represented, among others, members who are orchestra leaders, subleaders and sidemen, and has collective bargaining agreements with various employers (Stipulated Fact 2).

15. Membership in a local affiliated with Federation implies membership in the Federation (Stipulated Fact 4).

16. Defendant Federation is a labor union affiliated with the AFL-CIO and it consists of 683 local unions (including defendant Local 802) located throughout the United States and Canada (Stipulated Fact 5).

17. Defendant Federation has over 260,000 members, who perform musical services as conductors, instrumentalists, arrangers and copyists. The Federation represents, and

has traditionally represented, among others, members who are orchestra leaders, subleaders and sidemen, and has collective bargaining agreement with various employers (Stipulated Fact 6).

18. Almost all orchestra leaders and sidemen in the United States are members of AFM or one of its locals (84, 164-65, 1105).

19. The AFM publishes and is governed by its "Constitution, By-Laws and Policy" (Exs. 300, 12, 160, 161, 162, 163, 164, 164a, 164b). Likewise, Local 802 publishes and is governed by its Constitution and By-Laws (Exs. 165-172, 141, 29) and other booklets including Price Lists and Wage Scale Booklets (Exs. 173-195, 205-209, 306).

20. Defendants Al Manuti, Max L. Arons and Hyman B. Jaffe are President, Secretary and Treasurer, respectively, of defendant Local 802 (Stipulated Fact 3).

21. Defendants Herman D. Kenin, Stanley Ballard and George V. Clancy are President, Secretary and Treasurer, respectively, of the defendant Federation (Stipulated Fact 7).

22. There is no evidence that any of the defendants who are officers of the defendant unions have committed; as individuals, any of the acts complained of by plaintiffs.

23. The defendants Al Manuti, Max L. Arons and Hyman B. Jaffe, together with other members of Local 802, are members of Local 802's Executive Board (the "Executive Board") (Ex. CJ, Section 4, p. 5).

## II. DEFINITIONS

24. "Single engagements" are engagements generally for one day, but always for less than one week (Stipulated Fact 8). All other engagements are referred to as "steady engagements" (id.).

25. For convenience of reference in this opinion, certain types of engagements sharing some common characteristics

will be referred to as groups. Thus, a "club date" is a single engagement such as a wedding, commencement, bar mitzvah, debutante party, fashion show, or other social event (Stipulated Fact 8; St. Min. 69, 242-43, 438, 457-59, 806). Steady engagements at hotels, nightclubs, dance halls or restaurants will be called "hotel" steady engagements. Single engagements other than club date single engagements (3108, 3183-84, 3830-31, 3841), e.g., TV, recording, and all steady engagements, will be referred to as the "non-club date" field.

### III. MUSIC INDUSTRY GENERALLY

26. Members of defendant unions perform services as orchestra leaders, subleaders and sidemen on club dates and for hotels, restaurants, nightclubs, recording companies, broadcasting companies, theatres, steamships, and for The Radio City Music Hall, The Metropolitan Opera, The New York Philharmonic Society, and The City Center of New York (see F.F. I(A), *supra*, III, XIV, *infra*).

27. Plaintiffs and intervenors are in a market for musical services which includes states other than New York, as well as New York (1425, 2227, 2231).

28. Musical employment is highly casual, and except for employment by symphonic orchestras, a few opera societies and on staffs of network owned radio and television broadcasters, job tenure and enduring employer-employee relationships rarely exist (3673).

29. Musicians do not confine their activities to any one musical field. They seek engagements and perform services in any musical field where job opportunities exist (3291-96, 2156, 2159-65, 2417-18, 2875, 2889-90, 1159, 1160, Ex. CR). Thus, musicians who perform services as orchestra leaders, subleaders and sidemen in the club date field also perform services in non-club date fields (1160, 1314-15, 2417-18, 3074-75, 3291-96, 3661-62). Conversely, musicians who perform in the non-club date fields also work as leaders, sub-

leaders, or sidemen in the club date field when they are not otherwise engaged (564, 571, 1818, 1820, 1860, 1927-29, 2154-57, 2159-65, 2227-28, 2290-91, 2417-18, 2430, 2889-90, 3074-75, 3291-96, 3661-62).

30. The number of steady engagements is a small minority of the total number of engagements, single and steady (274-75, 350-51, 3108-09).

#### IV. LEADERS GENERALLY

31. Orchestra leaders, including plaintiffs, conduct at engagements at which they personally appear (839-41, 960, 1311, 1427; St. Min. 116, 393).

32. Conducting is a musical service and orchestra leaders, when conducting, fulfill the same function, whether they are "employers" (for any purpose) or "employees" (Stipulated Fact 11), and whether they are working in the single engagement or the steady engagement field (578-79, 713-16, 1054-56, 1182-83, 3535-36).

33. Only a relatively small group of musicians act as leaders all or virtually all the time. Plaintiffs are included in this group (3666-67; Ex. 58).

#### V. JOB OR WAGE COMPETITION OR OTHER ECONOMIC INTER-RELATIONSHIP BETWEEN LEADERS AND OTHER UNION MEMBERS

##### *A. Interrelationship between leaders and sidemen who occasionally lead*

34. A considerable number of musicians act only occasionally as leaders and act as sidemen the rest of the time (Exs. K, L, M; Stipulated Fact 10).

35. Such musicians who work as sidemen in club date or non-club date fields perform as leaders in the hotel steady and club date fields. They bid for the same jobs as full-time leaders such as plaintiffs and perform the same musical service when they get a job. They also perform in the same



places as full-time leaders (2291, 2553-54, 2571, 2395-96, 2411-12, 2422-23, 2427, 2428-30, 2874-75, 2889-90, 2894, 3038-40, 3052-54, 3088-89, 3293, 3653-54, 3666-68, Exs. 58 DE, pp. 188-89, HE; F.F. 29).

*B. Interrelationship between leaders and subleaders*

36. Plaintiffs belong to a group of orchestra leaders operating primarily in the club date field and occasionally in the hotel steady field who regularly use subleaders for their engagements. They generally do this when they accept simultaneous engagements for more than one orchestra. Subject to instructions which are sometimes given by the leader, the subleader performs all the musical services which the leader would have performed had he been present (327, 565-66, 573, 582, 607, 616-17, 812, 826-27, 708, 838, 965, 1010-11, 1193-94, 1864-66, 1896, 2604-06, 3045; St. Min. 73, 76, 130-31, 176, 276, 307, 314, 393, 801, 873-74).

37. Subleaders are employees (conceded by plaintiffs in marking defendants' proposed findings of fact).

38. Each time plaintiffs personally conduct an orchestra in the hotel steady and club date fields, they displace the services of a subleader who would otherwise have been engaged to conduct the orchestra (583-84, 565-66, 573, 582, 617, 704, 845, 812-14, 960-65, 1194, 1313, 1353, 1375-76, 1778-79, 2039-44, 2604-06; St. Min. 83-84; F.F. 36).

*C. Interrelationship between leaders and sidemen*

39. Instrumentalists who perform services in orchestras other than as leaders or subleaders are referred to as sidemen.

40. Sidemen are employees (conceded by plaintiffs in marking defendants' proposed findings of fact).

41. Almost without exception, all members of defendant unions who are now orchestra leaders (including the individual plaintiffs herein) worked as sidemen when they

joined defendant unions and continued to work as sidemen for a number of years thereafter (Stipulated Fact 13).

42. All members of Local 802 are entitled to have their names included in the directory of membership of Local 802 under whatever category they select. Each of the individual plaintiffs, while a member of the union, was included in the directory as an instrumentalist. For example, Cutler is listed under the heading "saxophone," and Carroll was listed under the heading "drums" (Stipulated Fact 9).

43. Plaintiffs other than Peterson (2039) belong to a group of orchestra leaders, operating primarily in the club date field and occasionally in the hotel steady field, who often, but not always, play musical instruments in addition to conducting at engagements at which they personally appear (524, 609-10, 826, 839-40, 957-58, 961-62, 1194, 1311-12, 1352, 1375, 1427, 2370; Ex. DE, p. 37; St. Min. 117).

44. An orchestra leader, in playing an instrument, fills a requirement for an instrument in the orchestra just as any sideman does (194-95, 842, 1313-14, 1353, 1375-76, 3054-55).

45. Each time plaintiffs play instruments in the hotel steady or club date field they displace the services of a sideman who otherwise would have been engaged to play the same instrument that the particular plaintiff played (F.F. 43, 44; 609-10, 842, 958-62, 1194-95, 1313-14, 1353, 1375-76, 1778-79, 3657).

## VI. EMPLOYMENT RELATION IN TELEVISION AND RADIO

46. For many years Federation has entered into collective agreements with the three major television and radio broadcasting networks, viz., Columbia Broadcasting System, Inc., American Broadcasting-Paramount Theatres, Inc., and National Broadcasting Company, Inc. In addition, Local 802 enters into collective bargaining agreements with stations owned by the networks and with various other independently owned stations, including WPIX (Exs. BLI-4, BM, BN, BT, IO, IP, KJ, KM).

47. The networks agreements result from joint negotiations with the three networks and similar individual collective bargaining agreements are entered into with each of the three networks (2258-66).

48. The network collective agreements relate primarily to two areas of broadcasting, viz.:

(a) live and video tape broadcasting (Exs. BL 1-4) under an agreement dated May 18, 1964, for a term commencing March 1, 1964, and ending June 30, 1966; and

(b) the recording of musical services on television film (Ex. 10) pursuant to an agreement dated May 1, 1964, for a term commencing May 1, 1964, and ending April 30, 1969 (2258-59).

49. The cost of furnishing music is a considerable expense to the networks and other broadcasting stations (2258, 2302).

50. Pursuant to collective agreements, each of the network broadcasting companies engages approximately 100 musicians, including orchestra leaders, who perform services on a regular annual basis (2262-63, 2268-69, 2305-06; Ex. BL 1-4). The musicians so engaged are generally referred to as "staff musicians" (2264, 2268-69). The networks, in addition, also employ musicians on a single engagement basis (2264, 2292-93, Ex. BL 1-4).

51. With regard to the services of musicians, whether employed either on a staff or a single engagement basis, each network broadcasting company, through the director of music operations or producer of a show:

(a) hires the orchestra leader (2256-57, 2270, 2271, 2317);

(b) hires each of the sidemen (2256-57, 2271, 2272-73);

(c) decides, subject to union minimum requirements, on the number of leaders and sidemen who are to be engaged (2272-73);

(d) determines, subject to contractual obligation, the compensation of musicians (2326);

(e) selects the sidemen who will play for the orchestra leader (2272). (The musicians performing services for the broadcasting company play under the leadership of different orchestra leaders, some of whom are staff conductors and others, guest conductors (2269, 2277-78));

(f) determines the compositions to be played (2273-74);

(g) exercises control over the musical direction and decides how the orchestras are to render their pieces, including such things as tempo and variations in an arrangement (2275-76, 2280, 2311-12, 2319-20); sometimes the orchestra leader will provide guidance to the TV executive responsible for the program (2321);

(h) calls for rehearsals (2274);

(i) disciplines and discharges musicians who are unsatisfactory (2288-89, 2323; Ex. IP, pp. 13, 26);

(j) pays all expenses connected with the performances of the orchestras, including the cost of arrangements, the orchestra leader's salary, the sideman's salary, doubling, cartage fees, wardrobe allowance, extra compensation where makeup or costumes are required, transportation, insurance of instruments (2272-73, 2281-84, 2317; Exs. BL 1, 3, par. 5; BL 4, p. 9; IP, pp. 18, 20, 21; IO);

(k) furnishes paid vacations, meal periods and rest periods (2281-82);

(l) makes payments on behalf of the musicians to a pension welfare fund (Ex. BL 1, 3, par. 9; 2281);

(m) pays severance pay to laid-off musicians (2265).

52. The person vested with control over live and video tape broadcasts is the producer of the particular program involved. The producer of programs owned by the networks is an employee of the broadcasting company (2313-14).

53. Music for television films generally consists of background music which is inserted after the performance has already taken place and been captured on film. The persons responsible for the music on television film are the musical director and producer, both of whom are employed by the network broadcasting company (2284-86, 2319-20). The musical director, working in conjunction with the producer of a particular program, customarily does the following things with regard to the services of musicians:

- (a) determines the type of music to be used in the film (2284-85, 2320);
- (b) determines the persons who are to compose and arrange the music (2284, 2320);
- (c) determines the orchestra leader to be used (2257, 2320);
- (d) determines the sidemen to be used (2257, 2320);
- (e) determines when the music is to be recorded on the tape which will be integrated with the film (2285-86); and
- (f) supervises the integration of the music with the film so that the music sound tract is coordinated with the filmed action (2286-88).

54. The broadcasting companies withhold and pay over to the appropriate governmental agencies the usual employer deductions for all musicians, including orchestra leaders (2271). On rare occasions (less than six times a year for CBS), a broadcasting company engages the services on a name band and a lump sum is paid to the orchestra leader in payment for his services and the services of the sidemen performing with him (2297, 2299-2300, 2323).

55. The minimum union wages and working conditions relating to single engagements for networks are set forth in the collective agreements between the networks and defendant unions and are summarized in the booklet published



by Local 802 entitled, "Price List Governing Single Engagements Radio and Television" (Ex. GJ; 2327).

56. The broadcasting companies have effective control over the rendition of services by musicians engaged by the broadcasting companies (2276-77, 2284-85, 2288, 2313-14, 2317, 2321).

57. Plaintiff Cutler performed services as a leader for a telecast by Station WPIX, New York (Ex. DR-3). Plaintiff Cutler was paid by separate check and all employer deductions were made by Station WPIX (id.). There is no evidence that the degree of control exercised by the broadcasting company over the services of the musicians on Cutler's engagement differed from the control exercised by the broadcasting companies over musicians as set forth above.

#### VII. EMPLOYMENT RELATIONSHIP IN RECORDING

58. Federation has entered into collective agreements with manufacturers of home phonograph records ("recording companies"). An agreement with recording companies expired December 31, 1963, and at that time an understanding had been reached between Federation and the recording companies with respect to the terms of a new collective agreement, which has not yet been reduced to writing (134-35).

59. The collective agreement between Federation and recording companies covers upwards of 1,000 recording companies and includes every major manufacturer of records in the United States and Canada (Ex. FG-1).

60. Federation has been certified by the National Labor Relations Board ("NLRB") as the collective bargaining agent for all musicians, including orchestra leaders, who perform services for recording companies (Ex. BE).

61. Musicians perform services for recording companies on a single engagement basis (1527, 2757).

62. Recording companies are in the business of manufacturing phonograph records which embody musical performances of members of defendant unions (1465-66, 1504, 2752-53).

63. An employee of the recording company known as the "artist and repertoire representative" (the "A&R man") has the ultimate responsibility for the musical product embodied in the phonograph recording. He actively participates in and has the last word in determining the nature of the various elements which comprise the recorded performance. In exercising this control the A&R man generally consults with the arranger-conductor and/or the vocalist, if any (2754-62, 2768-69, 2770-72, 2775-76, 1482, 1496, 1499-1502, 1504-05, 1508-11, 1518-19, 1522).

(a) A substantial number, probably a majority, of the popular recordings made feature vocalists rather than orchestras (2754, 2769, 1523-24).

(b) The conductor of the orchestra used for recordings is also usually the arranger. (2755, 1501-02).

64. The A&R man exercises the above-mentioned control over the following aspects of the preparation for the performance and the actual performance:

(a) selecting the orchestra leader (1501-02, 2754-55);

(b) determining the number and types of instruments to be used (1499-1501, 1518, 2754-55);

(c) employing a contractor to hire sidemen (the A&R man sometimes designates particular sidemen who are to be hired or avoided) (1518-19, 2756-58, 2762);

(d) deciding on the number and instruments of the musicians who are to perform (1503, 1518-19, 2754-56);

(e) determining the compositions to be played (1496, 1519-20, 2754-55);

(f) determining the seating arrangements and microphone placements for musicians (1504-05, 2758-60);

(g) determining when and where the actual recording session is to take place (1503-04, 2758, 2773); the recording session usually takes place at studios owned or leased by the recording company (id.);

(h) sometimes furnishing instruments to the musicians performing services (2764);

(i) determining the musical characteristics of the orchestra's performance including tempo, dynamics, tone coloring, volume, type of syncopation, and sometimes the nature of a sideman's performance (1508-11, 2761-62, 2763, 2775-76);

(j) sometimes requiring the addition of instrumentation to a recording after the original recording session ("sweetening"); often this subsequent sweetening takes place in the absence of the orchestra leader (1522).

65. All musical services must be performed to the satisfaction of the A&R man (1481-82, 1506-08, 1511, 2756, 2760, 2770, 2763). If the final recording does not meet with the approval of the A&R man, it will not be issued (1521, 2764).

66. The recording company pays compensation by individual checks payable to each of the musicians employed (2767-68, 2750; Ex. HP) or by a check payable to the leader or contractor for the total scale wages of leaders and sidemen which is transmitted to Local 802, less employer deductions (1491-91a, 1546-47, 2766-67). In the latter case, the recording company also sends a payroll record designating the gross and net amount payable to each musician (id.; Ex. EN).

67. The recording company withholds and pays over to the appropriate governmental agencies federal and state withholding taxes and social security taxes for all musicians, including the orchestra leader. The recording com-

pany also pays disability insurance for each of the musicians, including the orchestra leader (1494, 2750, 2786; Ex. HP). The recording company makes contributions to a pension welfare fund on behalf of each musician, including the orchestra leader (Exs. BS, pp. 29-30, EQ-ES).

68. Featured artists enter into royalty contracts with recording companies. Under those agreements there are deducted from the royalties otherwise owing to the featured artist, production costs such as wages paid to an orchestra leader; wages paid to sidemen; costs of arranging and composing, and the wages of choral groups (1541-42, 2784-86). If there are no royalties or an insufficient amount of royalties, the recording company bears these expenses without reimbursement (1542, 2784).

69. The recording company enters into a Form B Contract with the orchestra leader with respect to each recording session at which phonograph records are made (2765-66, Exs. DH, HO), which provides that the "employer [record company] shall at all times have complete control over the services of employees under this contract and the leader shall, as agent of the employer, enforce disciplinary measures for just cause, and carry out instructions as to selections and manner of performance" (id.).

70. Cutler performed as a leader in the making of a recording (St. Min. 83-84). There is no evidence that Cutler's manner of performance and the degree of control by the recording company differed from that referred to above.

71. Paragraph 12(d) of the collective bargaining agreement between the recording companies and defendant unions provides (Ex. BS):

"All present provisions of the Constitution, By-Laws, rules and regulations of the Federation (except those relating to requiring membership in the Federation) are made a part of this agreement to the extent to which their inclusion and enforcement as part of this agreement are not

prohibited by any present existing and valid law. No changes in the Federation's Constitution, By-Laws, rules and regulations which may be made during the term of this agreement shall be effective to contravene any of the provisions hereof."

72. The recording company has genuine and effective control over the rendition of services by musicians engaged by it including the orchestra leader.

#### VIII. MINIMUM PRICE REGULATIONS

73. Local 802's "Price List" Booklet requires each sideman to be paid minimum wages for single or steady engagements. Their wages are based upon a number of factors, including the type of engagement involved; the number of hours played; whether the sideman plays more than one instrument; whether playing is continuous or non-continuous; whether the musician has to transport certain bulky instruments; whether the musician is required to furnish an organ or music folios; whether the musician is required to rehearse; whether there is a show lasting more than twenty minutes; and whether uniforms (other than tuxedos) must be furnished by the musicians (Stipulated Fact 14).

74. Local 802's "Price List" Booklet requires each leader to receive certain minimum compensation for the services rendered by him. Thus, Rule 1 of the Price List Booklet provides as follows:

"RULE 1. 'Regulations for Establishing Leaders' Fees in Single Engagement Unless Otherwise Provided For.'"

"A. An engagement played by one member shall charge in addition to the Union Scale of the engagement 25 per cent additional as Leader (Personnel Manager) fee.

"B. An engagement played by two members shall charge in addition to the Union scale of the engagement 50 per cent additional as Leader (Personnel Manager) fee.



"C. An engagement played by three members shall charge in addition to the Union scale for the engagement 75 per cent additional as Leader (Personnel Manager) fee."

"D. Where four or more men are employed the Leader shall charge and receive double the regular scale, i.e., 100 per cent additional as Leader (Personnel Manager) fee." (Stipulated Fact 17.)

75. Similarly, Local 802's "Price List" Booklet provides as to steady engagements:

"RULE 10. On all steady engagements the Leader (Personnel Manager) shall charge 25 per cent additional when only one (1) man is employed, 50 per cent additional when two (2) men are employed, 75 per cent additional when three (3) men are employed, and for all engagements of four (4) men or more he shall charge double the price per man, except where otherwise provided." (Stipulated Fact 18.)

76. Local 802's "Price List" Booklet provides that the subleader shall receive the following as his minimum wage for single engagements:

"RULE 2. In the absence of the Leader (Personnel Manager), the member representing him for any part or all of the engagement shall receive one-half the extra charge made in conformity with Rule 1, unless otherwise provided.

"A. On all outside (Single) engagements, on which the orchestra is called upon to rehearse and/or play a show and for which there is an extra charge. The Musician who actually conducts the rehearsal and/or show shall receive double the extra charge regardless as to who contracts the engagement, number of musicians employed or who stands in front of the orchestra." (Stipulated Fact 24.)

77. Similarly, in connection with steady engagements the "Price List" Booklet provides:

"RULE 11. In the absence of the Leader (Personnel Manager), the member representing him for all or part of the

engagement shall receive one-half the extra charge made in conformity with Rule 1, unless otherwise provided." (Stipulated Fact 25.)

78. Thus, the subleader must receive as his minimum wages for conducting a four-piece band on a single engagement, one and one-half times the sideman's scale, or double the sideman's scale if a rehearsal or show is involved. (Stipulated Fact 26.)

79. Local 802 not only establishes minimum compensation for sidemen and orchestra leaders on single and steady engagements, but also requires orchestra leaders to charge purchasers prices which are not less than the aggregate of the minimum compensation payable to sidemen and leaders (Exs. 178, 179, 186-195; Stipulated Fact 27).

80. Other locals also set per man and leader minimum wages (Exs. 173-77).

81. The resolutions of May 17, 1960, and October 27, 1960:

(a) In the club date field establishments are classified by Local 802 as "Class A" or as "Special Class." Class A rates are higher than Special Class.

(b) In March 1960, resolutions were submitted by members of Local 802 for consideration at the April Price List meeting. One of the resolutions so submitted provided that the minimum scale wages of sidemen performing services on Class A club dates would be increased (Ex. Q).

(c) The April 1960 Price List meeting was scheduled to take place on April 18, 1960. Prior to the April Price List meeting, plaintiff Cutler, as well as other leaders, made known to Local 802 officers objections to the adoption of the proposed resolutions (1229-30, 1397-1402).

(d) The April Price List meeting was adjourned for lack of a quorum (Ex. LI). The Executive Board, on May 17, 1960, passed the resolutions referred to above, to become

effective with respect to club date engagements booked after June 15, 1960 (Exs. LI and JQ). Such action was taken pursuant to a standing resolution in the By-Laws granting to the Executive Board authority to adopt price list resolutions where they were not acted upon at a price list meeting because of the absence of a quorum (3263; Ex. 12, Section 3, p. 57).

(e) After the increase in rates for club date Class A engagements became effective, members of Local 802 appeared and requested that Special Class engagement minimum rates be increased in order to maintain the traditional differential between Class A and Special Class club date engagements (3264-65).

(f) On October 29, 1960, the Executive Board adopted a resolution increasing the rates of Special Class club dates (Stipulated Fact 16; Ex. CE).

82. Local 802, in order to insure that minimum wages and other working conditions are being observed, employs approximately 30 business representatives whose function it is to visit establishments at which members of defendant unions are engaged (622-23, 666, 3834).

83. Local 802 also furnishes to its members in certain fields (e.g., the club date field, the broadcasting field) "Price List" booklets which set forth the minimum wages and working conditions in those fields.

## IX. MINIMUMS

84. Local 802 has regulations requiring the employment of minimum numbers of musicians for the various rooms of hotels, catering establishments and ballrooms in the club date single engagement field. These regulations vary according to the establishment, function, day and time and apply to all club date single engagements attended by more than 75 persons (Exs. 178-185; 3238-39).

85. Federation and Local 802 have been parties to collective agreements with the purchasers of music for certain steady engagements pursuant to which the purchasers have agreed to employ a specified number of musicians (Network Television Agreement, EX BL 1-3; Radio City Music Hall Agreement, Ex. BH; Philharmonic Agreement, Ex. BZ-1; Metropolitan Opera Agreement, Ex. CB).

#### X. FORM B CONTRACT

86. Article 13, Section 33, of Federation's By-Laws provides:

"Members of the A. F. of M. are not permitted to sign any form of contract or agreement for an engagement other than that issued by the A. F. of M." (Ex. 300).

The form of contract issued by the AFM is the Form B Contract (Exs. Y, Z, EC).

87. The Form B Contract was first adopted in 1941 (Ex. Y, Art. XVI, pp. 170-79). It was recommended in order that orchestra leaders could qualify for social security benefits (3375). The language of the Form B Contract was formulated after discussions with the Treasury Department (Ex. EC44-45) and then submitted to the Commissioner of Internal Revenue for a ruling on the question of liability for Social Security taxes (Ex. EC 45-46). The Commissioner ruled that the hotel employing the musicians in question was the employer for purposes of the Social Security tax (Ex. EC 47).

88. Since 1941, the Form B Contract has been amended from time to time and at present there are various types in use for different types of engagements. Each type designates the purchaser of the music as the employer and the leader as an employee (Exs. Z, Z-1, Z-2, DF-DI).

89. Article 16, Section 1A, of Federation's By-Laws provides that on traveling engagements (Ex. 300):

"A. Any individual member, or leader, in every case before an engagement is played, must submit his contract for same to the local union in whose jurisdiction same is played, or in the absence of a written contract, file a written statement with such local fully explaining therein the conditions under which same is to be fulfilled, naming the place wherein same is to be played, the amount of money contracted for, the hours of the engagement, as well as the names of the members who will play same and the locals to which they belong, the actual amount of money paid each individual sideman, which cannot be less than the wage scale specified in Article 15 of these By-Laws and (except in Canada) their Social Security numbers."

The written contract referred to is the Form B contract (Ex. 300, Art. 13, § 33).

90. Local 802, in practice, does not require the use of the Form B Contract on club date single engagements; it accepts reports (in person, by telephone, or by mail) of details of the engagement sufficient to show that union scale has been complied with. It also accepts contracts other than Form B Contracts (656-63, 3597-99). In addition, it accepts contracts (Form B or other types) which specify as the total price or wage "union scale" rather than any dollar amount (3597-3604, 3837).

91. Local 802 does require the use of the Form B Contract on steady engagements, although it does not insist that a Form B Contract be filed prior to every engagement (665-66).

92. Any member failing to use the Form B Contract, where it is required in practice, is subject to penalty (Stipulated Fact 30).

93. Local 802 requires that an engagement as a leader shall not be effective unless first approved by the Executive Board (Ex. 165, Art. 4, § 5).



## XI. REGULATIONS PERTAINING TO TRAVELING MEMBERS

### A. 10% Surcharge

94. A tax called the "10% Traveling Surcharge" was assessed by the AFM on engagements played by members outside the jurisdiction of their home Local until 1964 (Ex. CM, Art. 15, § 1).

95. The 10% Traveling Surcharge was defined in the Constitution and By-Laws of the AFM as "An additional 10% based on the price of the Local in whose jurisdiction the engagement is being played \* \* \* added to the price [of the engagement] \* \* \*" (Ex. CM, Art. 15, § 3).

96. Federation's By-Laws provided that the leader was responsible for collecting and transmitting the traveling surcharge tax to Federation (Ex. CM, Art. 15, Sec. 7) and that the tax was to be distributed as follows: 4/10 was to be retained by Federation, 4/10 was to be paid to the local in whose jurisdiction the traveling engagement took place, and 2/10 was to be distributed to members of the orchestra playing the engagement (id.).

97. In April 1963, AFM's 10% Traveling Surcharge tax as it was then administered was held by the Second Circuit to violate Section 302 of the LMRDA in *Cutler v. AFM*, supra.

98. Federation's June 1963 Annual Convention adopted a resolution abolishing the traveling Surcharge tax, effective January 1, 1964 (Ex. LG).

99. At the June 1963 Convention, a new 10% wage differential on traveling engagements (the "Traveling engagement wage differential") was adopted. Article 15 of the 1964 Federation By-Laws provides that in the case of a steady traveling engagement the "minimum wage to be charged and received by any member" shall be "no less than the wage scale of the local in whose jurisdiction the services are rendered, plus 10% of such local wage scale";

and that, in the case of a single engagement, the minimum wage to be charged and received shall be "no less than either the wage scale of the local in whose jurisdiction the services are rendered or the wage scale of the home local of the member performing such services, whichever is greater, plus 10% of the wage scale of the local in whose jurisdiction the engagement takes place" (Ex. 300, Art. 15, § 2).

100. The purpose of the traveling engagement wage differential is to protect work opportunities for local musicians within their respective local union jurisdictions (3675, 3725-28).

*B. Illustration of Application of the Traveling Engagement Wage Differential-Engagements Performed by Local 802 Members in Local 38, Westchester*

101. The Local 802 scale for club dates is higher than the union scale in the jurisdiction of Local 38, Westchester County, New York (741).

102. Pursuant to Article 15, Section 2, of Federation's By-Laws, members of Local 802 who perform club date single engagements in the jurisdiction of Local 38 in Westchester County are required to charge the Local 802 scale plus 10% of the Local 38 scale (Ex. 300).

103. As a result of the higher Local 802 scale and the 10% wage differential, the minimum union scale price which must be charged by a Local 802 orchestra leader performing in the jurisdiction of Local 38 is higher than the minimum union scale price which must be charged by a Local 38 leader performing in the same jurisdiction.

104. Notwithstanding the differential in scale price in favor of Local 38 members, Local 802 members, including plaintiff Cutler, have performed engagements in the jurisdiction of Local 38, both prior and subsequent to 1960

increases in Local 802 scale (Exs. GK-GT, HE, HF, LI, JQ, CE, GK-GR; 2572-91; Stipulated Fact 16). Plaintiff Cutler, both before and after the 1960 increases in Local 802 scale, almost without exception, bid for jobs in Westchester at prices in excess of union scale(2587-90).

*C. Restrictions on Job Solicitation by Traveling Members*

105. Under Federation's By-Laws a traveling member performing a steady traveling engagement is not permitted to solicit or accept a single engagement either in or out of the jurisdiction in which the steady engagement is being played during the tenure of the steady engagement (Ex. 300, Art. 17, § 14).

106. Under Federation's By-Laws, a member of a local may not form a traveling orchestra to compete with or fill engagements in his home local (Ex. 300, Art. 17, § 24). For example, a member of Local 802 may not form an orchestra to perform an engagement within Local 802's jurisdiction unless that orchestra consists entirely of members of Local 802.

107. Traveling orchestras which establish headquarters in the jurisdiction of any Local are not permitted to compete for or accept and play engagements in that jurisdiction (Exs. CM, 300, Art. 17, § 23).

108. An out-of-town orchestra leader playing a steady engagement in a particular jurisdiction is prohibited from playing a single engagement in that jurisdiction for some other client during the period of the steady engagement (Exs. CM, Art. 17, § 14; 300, Art. 17, § 14) or remain in the jurisdiction after completing a steady engagement to solicit another steady engagement (Exs. CM, Art. 17, § 17; 300, Art. 17, § 17). Nor may members of a traveling orchestra be used by the manager of a company with which they travel, or by the local employer, to displace the local orchestra or any member thereof, if the displacement interferes

with the contract under which the local orchestra is employed (Exs. CM, Art. 16, § 31; 300, Art. 16, § 27).

109. A traveling band may not play a radio or TV engagement which is local in character (not on a network) (Ex. CM, Art. 23, § 1).

#### *D. The Local Work Dues Equivalent*

110. Since January 1, 1964, Federation's By-Laws have provided for the payment by traveling members of local work dues equivalents to locals which require such payments. Local work dues equivalents are payments equal in amount to the work taxes which locals impose upon their own members in connection with earnings from jobs performed within the jurisdiction of such locals. Such payments are based upon a percentage of the members' earnings from such jobs (Ex. 300, Art. 2, § 8(c)).

111. Prior to January 1, 1964, Federation's By-Laws provided that traveling members could not be required to pay local work dues equivalents on engagements to which the Federation traveling surcharge tax applied (Ex. CM, Art. 16, § 26).

112. Under Federation's By-Laws, local work dues equivalents may be imposed only by a local which "uniformly requires its own members to pay the same percentage of their scale wages in connection with the rendition of the same classification of services" (Ex. 300, Art. 2, § 8(c)). Local work dues equivalents may not exceed 4% of scale wages and may not be imposed on wages of traveling members "derived from symphony or opera services" (Ex. 300, Art. 2, § 8(E), (F)).

#### *E. Transfer Members*

113. Under Federation's By-Laws, a member of one local who moves his residence to a place within the jurisdiction of another local and who indicates his wish to become a

member of such other local, is called a transfer member (Ex. 300, Art. 14); and Federation locals are required to accept applications to grant full membership to transfer members who have resided in their jurisdictions at least six months (*id.*, § 2).

114. Under Federation's By-Laws, Art. 14, a transfer member may not solicit or perform any steady engagement within that local's jurisdiction for a period of three months after the date he is granted transfer membership (*id.*, § 7). He is also prohibited from performing engagements outside the jurisdiction of the transfer local, except that he may do so with orchestras consisting of members of the transfer local after three months (*id.*, §§ 8, 9).

## XII. BOOKING AGENTS

115. Persons who act as "bookers, agents, representatives and managers of members, orchestras or bands, or who secure engagements and contracts for such members, orchestras and bands" are referred to as "booking agents" (Ex. 300, Art. 25, § 1).

116. Since 1936, Federation has required booking agents to enter into license agreements with Federation as a condition to representing or acting in behalf of Federation members (3370-73; Ex. JX).

117. Pursuant to the provisions of Federation's By-Laws, each such booking agent must enter into a standard form of license agreement with Federation under which he agrees not to charge more than a 10% commission on steady engagements, a 15% commission on single engagements, not to book non-union musicians, and not to book orchestras for less than union scale wages and working conditions (3373-74; Ex. 300, Art. 25, pp. 151-59). Federation makes no charge for the license agreement (533, 999).

118. The regulation of booking agents was considered at Federation's 1936 Convention. At that time, many booking agents charged exorbitant fees to members and



booked engagements for musicians at wages which were below union scale (1016-17, 1121-24, 3370-73). The President's report made at that Convention stated (Ex. JX):

"Many booking offices or agents do not now charge the standard wage for musicians and, in other cases where they do so, same is not paid to the musicians. This condition could only develop with the connivance of some contracting members or leaders who, in collusion with agents, frustrate the efforts of the union to enforce its wage scale. These leaders, or contracting members, by thus violating the laws of their organization, gain an advantage over other leaders in securing employment. As a result, a great percentage of the orchestras doing jobbing work or filling casual engagements, play for less than the union scale, and, in cases where the union tries to control the situation through the deposit of contracts with the union, false contracts are often deposited."

119. Following the submission of that report, Federation adopted provisions relating to booking agents which are substantially the same as those presently in effect (3370-74). Subsequent to the adoption of the regulations governing booking agents, the abuses just referred to were, to a large extent, eliminated (1017, 1123-24).

### XIII. CATERERS

120. Many club date single engagements take place in catering halls which are rented by purchasers of the music. Catering halls do not supply orchestras, but some proprietors of catering halls recommend particular orchestras to prospective purchasers and receive commissions from the orchestra leaders (757-59, 773-74, 2330-5, 2361-63, 3246-48).

121. Local 802's By-Laws contain the following standing resolution (Ex, CJ, pp. 75-76):

"A. Caterers, banquet managers and others connected directly or indirectly with halls, hotels and all similar es-

tablshments which provide facilities for public or private functions, are prohibited from engaging leaders or musicians, for such affairs.

"B. Caterers or establishments violating the above may be placed on the Unfair List for such time and under such conditions as shall be determined by the Executive Board.

"C. The payment or promise of payment, or any gift or consideration whatever, to the above is contrary to the principle of fair competition among members of this local, and any member guilty of such offense shall be fined not more than Five Hundred Dollars (\$500.00) or suspended, or both."

This standing resolution has been in effect for approximately fifteen years (3246).

122. In 1947, prior to the adoption of the By-Laws relating to caterers, Local 802 appointed a committee to investigate conditions in hotels and catering halls. The committee's preliminary report, which was printed in the February 1947 issue of ALLEGRO, stated (Ex. JN):

"The objective of this committee's important assignment can be stated simply: the elimination of the caterer from the music business and the restoration to the musician of his right to earn a living without any restrictions and pressures upon him. Your committee believes, and knows that in that belief it reflects the unanimous opinion of the membership, that all money spent for music should go to musicians and not to chiselers. We oppose any caterer booking orchestras because that obviously leads to a depressing of union scales. The caterer must be barred from compelling people to use a specific orchestra."

The committee found evidence of "monopoly" and "collusion."

## XIV. COLLECTIVE BARGAINING

123. Defendant unions do not bargain collectively with purchasers of music or with orchestra leaders with respect to wages and working conditions applicable to single engagements (26, 252-54, 3262; St. Min. 581-82).

124. Defendant unions have for many years bargained collectively with purchasers of music in various non-club date fields (2984-95). Thus, there are presently in effect (or have recently expired and are in the process of negotiation), among others, the following collective agreements to which either or both of the defendant unions are parties:

(a) Collective agreement between Federation and phonograph recording companies, effective January 1, 1959 (Ex. BS).

(b) Collective agreements between Federation and both NBC and CBS covering network radio and television, dated May 18, 1964 (Ex. BL-1, BL-3).

(c) Collective agreements between Federation and both NBC and CBS covering local radio and television, dated May 18, 1964 (Ex. BL-2, BL-4).

(d) Collective agreement between Federation and television film producers (blank form) (Ex. IM).

(e) Collective agreement between Federation and various makers of television video tape, effective July 1, 1964 (Ex. HX).

(f) Collective agreement between Federation and television film producers (Ex. HY).

(g) Collective agreement between Federation and television producers relating to pay television motion pictures (Ex. HZ).

(h) Collective agreement between Federation and television video tape producers (Ex. BN).

(i) Collective agreement between Federation and Independent Motion Picture Producers (Ex. BO).

(j) Collective agreement between Federation and Producers of Non-Theatrical Documentary & Industrial Films (Ex. BQ).

(k) Collective agreement between Federation and advertising agencies covering television and radio commercial announcements (Ex. BT).

(l) Collective agreement between Federation and producers of electrical transcriptions (Ex. BV).

(m) Collective agreement between Local 802 and The League of New York Theatres, Inc., dated June 25, 1964 (Ex. BI).

(n) Collective agreement between Local 802 and Shubert Interests Operating Legitimate Theatres in New York City, dated September 2, 1963 (Ex. BJ).

(o) Collective agreement between Local 802 and both American Export Lines Inc. and United States Lines Co., dated April 24, 1963 (Ex. IB, IB 1).

(p) Collective agreement between Local 802 and Radio City Music Hall, dated September 30, 1963 (Ex. BH)..

(q) Collective agreement between Local 802 and The Metropolitan Opera, dated July 1, 1961 (Ex. CB).

(r) Collective agreement between Local 802 and the Philharmonic-Symphony Society of New York (Ex. BZ, BZ 1).

(s) Collective agreement between Local 802 and New York City Opera, dated March 12, 1962 (Ex. BX).

(t) Collective agreement between Local 802 and New York City Ballet, dated March 1, 1962 (Ex. BY).

(u) Collective agreement between Local 802 and Music Publishers Protective Ass'n, Inc., dated September 21, 1964 (Ex. IC).

(v) Collective agreement between Local 802 and hotels or restaurants (Ex. BK).

(w) Collective agreements between Local 802 and Cafe Geiger dated November 16, 1962, with letter of correction dated April 17, 1963 annexed (Ex. IA).

(x) Collective agreement between Local 802 and Michael Gaynor, regarding Flatbush Terrace, dated January 24, 1964 (Ex. CV).

(y) Collective agreement between Federation and the three major networks relating to TV film, dated as of May 1, 1964 (Ex. IO).

(z) Collective agreement between Local 802 and National Broadcasting Company, Inc., dated August 5, 1955 (Ex. IP).

(aa) Collective agreement between Local 802 and WNEW Radio New York, dated July 23, 1964 (Ex. KL). Similar agreements have been entered into with other stations (Exs. KJ, KK).

125. The collective agreements referred to above set forth the hours and working conditions of all musicians, including orchestra leaders, covered by those agreements. Those agreements were the result of negotiations between Federation or Local 802, or both of them, and the purchasers of music, or an association of purchasers of music (2995, broadcasting 2258-66; theatres 2992-93; steamships 3225-27; Radio City Music Hall 3020-22; Metropolitan Opera 2852-55; New York Philharmonic 3192-3; New York City Center Opera 2992; New York City Center Ballet 2992; hotels, restaurants and night-clubs 2988-89, 2991-92, 3197-3205, 3210, Exs. IT-JB).

126. Defendant unions, before bargaining collectively with the purchasers of music, conducted meetings of their members to formulate the demands to be bargained for (hotels, restaurants and nightclubs, 3214-17, Ex. JC; Yorkville restaurants, 3224; steamships, 3226; theatres, 3283). No spe-



cial invitations were sent to orchestra leaders to participate in the negotiations with the purchasers of the music (891-892, 1060). Upon completion of negotiations with purchasers, but prior to the execution of the collective agreement, members of defendant unions were given the opportunity to approve or disapprove of the proposed agreement (television networks 3183-4, Ex. II; recordings 3184-5, Ex. JT; television film (3186-87, Ex. IN; Radio City Music Hall 3022; New York Philharmonic-Symphony Society of New York, Inc. 3193; hotels, restaurants and nightclubs (3219-3222, 3225, Ex. JD).

## XV. MONOPOLY

127. Defendant unions endeavor to foreclose non-union orchestra or leaders from the music field principally by not permitting members to play in the same orchestra as non-members (Ex. 300 Art. 13, §§ 5-7; Art. 18, § 26; Ex. 165, Art. 4, § 1 (h)), by not permitting members to deal with unlicensed booking agents (Ex. 300, Art. 25, §§ 4, 22), by not permitting licensed booking agents to book engagements for non-members (Ex. 300, Art. 25 at p. 151), by securing the cooperation of television companies (2314-15), record companies (1469) and hotels (1704-06, 2341) in not hiring non-union bands and by precluding non-members from entering Local 802's exchange hall where sidemen are hired for engagements (2108).

## DISCUSSION

### I. CLASS ACTION

Plaintiffs claim that they represent a class of orchestra leaders largely engaged in the single engagement field who (a) are employers who regularly employ sidemen or employee musicians who are members of AFM, Local 802, or another Local affiliated with AFM; and (b) are independent contractors largely engaged in the single engagement field. (Complaints, 60 Civ. 2939, par. 24; 60 Civ. 4926, par. 17)

It is also alleged that "this complaint raises common rights; and a common relief is sought herein; and the object of this action is the adjudication of claims which do or may seriously affect the specific property rights of plaintiffs and of said class \* \* \*." (Complaints, 60 Civ. 2939, par. 23; 60 Civ. 4926, par. 16)

The class action is defined in Rule 23(a), Federal Rules of Civil Procedure:

"Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

"(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

The three categories of class actions in Rule 21(a), (b), (c) are called respectively "true," "hybrid" and "spurious." Under the prevailing view a judgment in the true class action is conclusive on all members of the class represented, in a hybrid class action on all members of the class as to rights in the res, and in a spurious class action on only the persons named as parties. *Dickinson v. Burnham*, 197 F.2d 973, 979 (2d Cir.), cert. denied, 344 U.S. 875 (1952) and cases cited. Since *Hansberry v. Lee*, 311 U.S. 32, 43 (1940), commentators have urged the abolition of

these distinctions in the effect of a judgment in the three types of class suits. *Dickinson v. Burnham*, supra at 979. The view advocated is reliance on the test of adequate representation to determine whether absent parties should be bound. *Rank v. Krug*, 142 F.Supp. 1, 154 n. 93 (D. Cal. 1956), modified on other grounds, *California v. Rank*, 293 F.2d 340 (9th Cir. 1961), modified on other grounds, *Dugan v. Rank*, 372 U.S. 609; *Fresno v. California*, 372 U.S. 627 (1963).

These divergent views have important practical ramifications. Since under the current view only the parties to the action are bound in a spurious class action, the issue of whether they adequately represent a class is only important as it relates to the right to intervene. *York v. Guaranty Trust Co. of N.Y.*, 143 F.2d 503, 528, n. 52 (2d Cir. 1944), rev'd on other grounds, 326 U.S. 99 (1945). It is merely a device for permissive joinder. *Carroll v. Associated Musicians of Greater New York*, 206 F.Supp. 462, 469-70, 51 LRRM 2310 (S.D.N.Y. 1962), aff'd, 316 F.2d 574, 53 LRRM 2063 (2d Cir. 1963).

Nevertheless, I find that plaintiffs fail to adequately represent the class they purport to represent. This suit is part of a series of suits in which the same orchestra leaders are leading a challenge to various union activities. The present suit challenges many phases of union regulation. If successful in all respects it would substantially weaken the union. It would not be surprising if there was a division among the orchestra leaders in the union on this subject. The complaints themselves indicate that some orchestra leaders willingly cooperate with the union (e.g., Complaint, 60 Civ. 4926, pars. 24, 25, 41). *Hansberry v. Lee*, 311 U.S. 32 (1940); *Giordano v. R.C.A.*, 183 F.2d 558, 26 LRRM 2380 (3rd Cir. 1950).

This question of conflict among the members of the proposed class was treated in three prior decisions involving musicians unions. In all, it was a basis for rejecting the

propriety of a class suit. *Associated Orchestra Leaders of Greater Phila. v. Philadelphia Musical Soc.*, 203 F.Supp. 755, 757, 49 LRRM 3043 (E.D.Pa. 1962); *Cutler v. AFM*, 211 F.Supp. 433, 444-45, 51 LRRM 2729 (S.D.N.Y. 1962), aff'd, 316 F.2d 546, 53 LRRM 2060 (2d Cir.), cert. denied, 375 U.S. 941, 54 LRRM 2715 (1963); *Carroll v. Associated Musicians of Greater New York*, supra at 470-71.

Moreover, the plaintiffs do not adequately represent certain orchestra leaders whom they purport to represent. They lack certain characteristics that distinguish "name" bands:

(1) Distinctive musical styles based on the arrangements used by the band and, perhaps, the style of the leader as a soloist;

(2) National reputations; and

(3) Leaders who always appear and never use sub-leaders.

These characteristics would be relevant in any evaluation of the status of the name bandleaders under the anti-trust laws.

The class suit or at least the representation of persons other than the parties to the suit fails on other grounds.

Rule 23(a)(1) requires that members of the class have a joint, common, or secondary right. The present suit clearly does not qualify, since the rights sought to be enforced are several and not secondary or derivative in nature.

Rule 23(a)(2) permits a class action where the rights of the members of the class are several and the action involves claims to specific property. No specific property will be affected by the present suit, hence, this provision is ineffective as support for a class suit here.

Rule 23(a)(3) provides for the spurious class suit. As was observed earlier, such a suit binds only the parties to

the action and is efficacious only as a device for permissive joinder. Therefore it is irrelevant whether this suit qualifies as a spurious class suit since no questions of joinder are now presented. Whether or not a spurious class action, only the parties will be affected. See Moore, 3 Federal Practice 3444-45, 3465 (2d ed. 1964).

Therefore, this action will be treated as affecting only the actual parties.

## II. ALLEGED ANTITRUST VIOLATIONS

The plaintiffs charge that the following acts of defendants violate the antitrust laws:

- (1) pressuring orchestra leaders into the union;
- (2) imposing minimum price regulations on orchestra leaders;
- (3) imposing minimum numbers of sidemen requirements on orchestra leaders;
- (4) requiring the use of the Form B Contract;
- (5) imposing restrictions on traveling orchestras;
- (6) failing to bargain collectively;
- (7) regulating booking agents and caterers;
- (8) monopolizing the music industry.

The plaintiffs' position as stated in the complaints is that these acts constitute a violation of the antitrust laws because they represent a combination between a union and orchestra leaders, including the unwilling plaintiffs, in restraint of trade.

## III. ANTITRUST — LABOR LAW

With the benefit of "the light shed by the Norris-LaGuardia Act on the nature of the industrial conflict" the Supreme Court first stated the current extent of organized



labor's liability under the antitrust laws in *United States v. Hutcheson*, 312 U.S. 219, 7 LRRM 267 (1941). The Court read "the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." *Id.* at 231

Exercising logic which has been much discussed since the decision, the court stated: "The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act," *id.* at 236, and concluded that "so long as a union acts in its self-interest and does not combine with non-labor groups" the conduct enumerated in Section 20 of the Clayton Act was not a violation of the Sherman Act.

The statement of the exemption was further developed in *Allen-Bradley v. Local 3, International Bhd. of Electrical Workers*, 325 U.S. 797, 16 LRRM 798 (1945). The court said that the Norris-LaGuardia Act "emphasized the public importance under modern economic conditions of protecting the rights of employees to organize into unions and to engage in 'concerted activities for the purpose of collective bargaining or other mutual aid and protection.'" *Id.* at 805. However, the court held that unions could not, "consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services." *Id.* at 808.

The meaning of the term "non-labor" group has been developed in a series of cases dealing with the issue of whether a union could organize and regulate independent contractors. *Los Angeles Meat Drivers Union v. United States*, 371 U.S. 94, 51 LRRM 2448 (1962); *Milk Wagon Drivers Union v. Lake Valley Farm Prods.*, 311 U.S. 91, 7 LRRM 276 (1940); *United States v. Fish Smokers Trade Council, Inc.*, 183 F.Supp. 227, 38 LRRM 2399 (S.D.N.Y. 1960); *Cf., Bakery Drivers Union v. Wohl*, 315 U.S. 769, 8 LRRM 457 (1941). Applying the Norris-LaGuardia Act,

a search was made in these cases for a "labor dispute" within the meaning of that Act to determine whether an exemption from the Sherman Act was available. The criterion used was the presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors. If such a relationship existed the independent contractors were a "labor group" and party to a labor dispute under the Norris-LaGuardia Act. Hence, the Sherman Act was inapplicable to any combination between the union and the independent contractors.

The ultimate issue in determining whether a relationship exists which would exempt conduct complained of from the Sherman Act is whether the work and functions performed by the independent contractors actually or potentially affect the hours, wages, job security or working conditions of the union members in the same industry. If so, the union may combine with the independent contractors by including them in the union and subjecting them to union regulation. *Los Angeles Meat Drivers Union v. United States*, supra; *United States v. Fish Smokers Trade Council, Inc.*, supra at 234.

Since the scope of the union exemption from the Sherman Act is defined by its self-interest in collective bargaining and protecting and improving conditions of employment, the activities complained of by plaintiffs will be proper if they relate to such legitimate union interests and are not carried on in combination with a non-labor group. "[T]he same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups." *Allen-Bradley Co. v. International Bhd. of Electrical Workers*, supra at 810.

#### IV. LABOR OR NON-LABOR GROUP?

A glance at the list of alleged illegal practices suggests that the legality of two of them depends on whether the plaintiffs comprise a non-labor group. This issue will be examined prior to considering the legality of the individual practices.

If employees, the plaintiff orchestra leaders are certainly a labor group. If employers or independent contractors, they will be a labor group only if they meet the test of job or wage competition or other economic interrelationship which was just discussed. For the purposes of examining the status of the orchestra leaders under the antitrust laws in the club date and hotel steady engagement fields, it will be assumed, without deciding, that they are employers or independent contractors. See *Cutler v. AFM*, supra; *Carroll v. Associated Musicians of Greater New York*, supra.

##### *A. Club Date and Hotel Steady Engagement Fields*

I find that in the club date and hotel steady engagement fields the plaintiff orchestra leaders are in competition with employee members of the defendant union regarding jobs, wages and other working conditions. As a result, they comprise a labor group in these fields.

The evidence in this case discloses that plaintiffs made a practice of leading their own bands and, except for Peterson, often played instruments too. They also regularly booked more than one engagement for an evening, in which case they used subleaders to direct their orchestras.

In operating in this manner plaintiffs perform functions identical to acknowledged employees who were also union members—subleaders and sidemen. Moreover when one of the plaintiffs personally led his band he occupied a job that was a potential position for a subleader. When

a plaintiff played an instrument as well as conducted, he filled a slot that was a potential job for a sideman and also displaced a subleader.<sup>2</sup> In displacing sidemen and subleaders from potential jobs, plaintiffs engaged in job competition with them.

As a consequence of this relationship, the practices of plaintiffs when they lead and play must have a vital effect on the working conditions of the non-leader members of the union. If they undercut the union wage scale or do not adhere to union regulations regarding hours or other working conditions when they perform, they will undermine these union standards. They would put pressure on the union members they compete with to correspondingly lower their own demands. The evidence disclosed that plaintiff Levitt actually did lead a band at a steady engagement at a dance hall for which he received less than the subleader's union minimum wage. (3323-24)

#### *B. Other Fields (Television, Recording and Concerts)*

Although virtually all of the plaintiff's time is used in playing club dates and hotel steady engagements, for the sake of completeness the other fields in which plaintiffs have engaged will now be considered.

Plaintiff Cutler has made one or two recordings and has had a television engagement. Plaintiff Peterson has had some concert engagements.

In the concert field there is not sufficient evidence from which findings can be made either as to the status of Peterson as an employee or independent contractor, or as

---

<sup>2</sup> If a subleader could be found who played the instrument usually played by the leader, then only a potential subleader's job would be lost.

to the existence of job or wage competition. He has not met his burden of proof in this regard.<sup>3</sup>

In the television and recording fields the evidence is inadequate to support findings as to job or wage competition. Further, an orchestra leader's status here is quite different from his position in the club date or hotel steady engagement field. It is not fruitful to assume that they are independent contractors. Therefore, in order to determine whether plaintiff Cutler was included in a non-labor group in these areas it will be necessary to consider whether he is an independent contractor or an employee.

This issue must be resolved by examining the degree of control which is exercised over the details of the service rendered by the orchestra leader and the factors which

---

<sup>3</sup> It is unlikely that Peterson could show an antitrust violation in the concert area. His status in this field is relevant to two charges: pressuring leaders into the union and fixing minimum prices.

Since leading at concerts constitutes only a very small percentage of Peterson's activities and the rest of his business is conducted in a manner which justified the pressure to join the union, the fact that Peterson might be a "non-labor" independent contractor in the concert field is immaterial. The union would still be entitled to attempt to induce or force him to join.

Further, if Peterson only organizes the concerts and does not personally conduct or play, as has been his practice since expulsion, he has failed to establish that in this capacity pressure was, in fact, exerted on him to join the union. See V. *infra*. If Peterson actually conducts at the concerts, then it is likely that he is in job and wage competition with subleaders and a member of a labor group. As such, he would be a proper subject for unionization. See V, *infra*.

Regarding the charge of minimum price fixing, if Peterson does not conduct or play at concert engagements, this charge would be treated the same as it would in the club or hotel steady field. See VI, *infra*. There would be no antitrust violation. If Peterson does conduct at concert engagements, as stated above, he would probably be a member of a labor group and a proper subject for union regulation.



make up the economic reality of the relationship, e.g., "the permanency of the relation, the skill required, the investment in the facilities for work and opportunities for profit or loss." *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947); *United States v. Silk*, 331 U.S. 704 (1947).

In contrast to the role of the orchestra leader in the single engagement field, *Cutler v. United States*, 180 F.Supp. 360 (Ct. Cl. 1960), the evidence discloses that in television and recording the orchestra leader is subject to considerable artistic supervision. An employee of the television or record company is charged with directing the performance and seeing that a product which fits the company's idea of a saleable item is produced. Usually the orchestra is integrated into a larger product which again must meet company-standards. The television or recording company also selects the sidemen and pays them. The orchestra leader does not bear the risk of loss in the enterprise and generally does not have an interest in the profits (unless he is the featured artist on a recording). The facilities other than the instruments used, and occasionally even instruments, are furnished by the recording or television company.

After reviewing all the evidence of the relationship between the orchestra leader and the television or recording company, and principally for the above reasons, I conclude that in the television and recording fields the plaintiff *Cutler* is an employee. See *American Broadcasting Company* 134 NLRB 1458, 49 LRRM 1365 (1961). I make no finding as to big-name bands, which, as I noted earlier, are not represented among the plaintiffs.

The two practices complained of by plaintiffs with respect to which the status of the orchestra leaders as a labor group is relevant are: (1) pressuring plaintiffs into joining the union; (2) fixing minimum leaders' fees and minimum engagement prices.

## V. PRESSURING OF ORCHESTRA LEADERS INTO JOINING THE UNION

It is clearly permissible for a union to pressure a group of independent contractors comprising a labor group into joining the union. *Los Angeles Meat Drivers v. United States*, 371 U.S. 94, 103, 51 LRRM 2448 (1962). Picketing was upheld as a means of inducing independent contractors comprising a labor group to join a union in *Milk Wagon Drivers Union v. Lake Valley Farm Prods., Inc.*, *supra*, and an agreement foreclosing all but union jobbers from the smoked fish industry which was directed to forcing jobbers into the union was held to violate the Sherman Act in *United States v. Fish Smokers Trade Council, Inc.*, *supra*, only because the jobbers were found to comprise a *non-labor* group.

In a decision relating to the AFM, *United States v. AFM*, 47 F. Supp. 304, 11 LRRM 596 (N.D. Ill. 1942), *aff'd*, 318 U.S. 741, 11 LRRM 840 (1943) (*per curiam*), the Supreme Court held the union's attempt to "eliminate all musical performances over the radio except those presented in person by members of the American Federation of Musicians," *id.* at 307, to be exempt from the Sherman Act by virtue of the Norris-La Guardia Act. See *National Labor Relations Act*, 29 USC, § 158(3) (1958). By limiting employment to union members, a union is, of course, coercing non-union workers to join it. Since the former is permissible, the latter certainly is.

There is no evidence in the record to indicate that the unionization of the plaintiffs was other than a matter of independent union action motivated by union self-interest. *Allen-Bradley v. Local 3, International Bhd. of Electrical Workers*, *supra* at 811; *United States v. Hutcheson*, *supra* at 232.

In conclusion, since the plaintiffs are a labor group in the club date and hotel steady engagement fields, the de-

fendants do not violate the antitrust laws in pressuring them into membership.

Since their expulsion from the defendant unions, Carroll and Peterson have not personally led or played at their engagements. They merely book and organize them. In this capacity they do not compete with sidemen or subleaders and the basis of the conclusion that they are a labor group falls. However, the union does not significantly hinder them from carrying on their business in this fashion. (See F.F. 12, 127.) Insofar as they do not themselves conduct or play, the charge of pressuring them into the union has not been sustained.

In the television and recording fields, the union is unquestionably free to pressure orchestra leaders like plaintiffs into membership since they are employees.

#### VI. FIXING MINIMUM PRICES CHARGED BY LEADERS

The minimum prices set by the union are equal to the total minimum wages of the sidemen employed plus a leader's minimum fee. If the leader does not participate in the engagement but employs a subleader, then a prescribed portion of the leader's fee goes to the subleader. The remaining fraction of the leader's fee goes to the leader. In reciting the extra charges to be paid a leader, the union Price List booklet refers to the leader in parenthesis as a "personnel manager."

In view of the competition between leaders and sidemen and subleaders which underlies the finding that the leaders are a labor group, the union has a legitimate interest in fixing minimum fees for a participating leader and minimum engagement prices equal to the total minimum wages of the sidemen and the participating leader. Any cuts by participating leaders of their fees below union minimums or in the price of an engagement below a union minimum equaling the total minimums of the participants puts an

obvious downward pressure on the wages of subleaders and sidemen (e.g., 1122).

The legitimacy of the concern of the union in fixing the minimum prices to be charged by a group of independent contractors comprising a labor group was upheld in *Local 24, International Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 43 LRRM 2374 (1958). The Supreme Court reversed a decision by the Ohio Supreme Court in which a collective bargaining agreement fixing the minimum rental prices of driver-owned trucks was held to constitute a violation of the Ohio antitrust law as a combination between the union and a non-labor group to fix prices. The Supreme Court held that the rental price of driver-owned trucks was a proper subject of bargaining under the National Labor Relations Act in view of the purpose of the provision to protect the wage scale of employee-drivers as well as to provide a decent income to the owner-drivers.

In *Milk Wagon Drivers Union v. Lake Valley Farm Prods., Inc.*, supra, the Supreme Court held the Sherman Act inapplicable to a union's efforts to organize a group of "vendors" who owned their own trucks and bought milk for resale to retail stores. The union's purpose was to improve the working conditions and "wages" of the vendors and to thereby protect the standards of the employee-drivers.

The question of whether the union can also provide a certain minimum compensation for "personnel managing" services to leaders who merely arrange an engagement (e.g., solicit it and organize the band) without participating in it, and insure a similar payment above the regular subleader's fee when they do participate is more difficult. Indeed, as noted earlier, Carroll and Peterson do not now personally lead at their engagements, but merely arrange them. The leader who performs the necessary functions of soliciting and organizing engagements also negotiates the price of the engagement with the purchaser of the music.

It is unquestionably true that skimping on the part of the person who sets up the engagement so that his costs are not covered is likely to have an adverse effect on the fees paid to the participating musicians. By fixing a reasonable amount over the sum of the minimum wages of the musicians participating in an engagement to cover these expenses, the union insures that "no part of the labor costs paid to a \* \* \* [leader] would be diverted by him for overhead or other non-labor costs." *Greenstein v. National Skirt & Sportswear Ass'n, Inc.*, 178 F.Supp. 681, 689 (S.D.N.Y. 1959).

In *Greenstein v. National Skirt & Sportswear Ass'n, Inc.*, supra, the status of an analogous agreement between a union and manufacturers of ladies clothing to the effect that the manufacturers pay to contractors who produce their garments an amount at least equal to the combined wages of the contractor's employees and a reasonable amount to cover overhead was in issue on a motion for preliminary injunction. The court concluded that the agreement did not violate the Sherman Act without proof that it was a result of a conspiracy to restrain trade between the employer and the union. "If these protective clauses were demanded and obtained by the union \* \* \* as a matter of independent action in furthering the welfare of the employees they represent, then the *Allen-Bradley* case \* \* \* is inapposite." *Id.* at 689. *Allen-Bradley v. Local 3, International Bhd. of Electrical Workers*, supra at 811; *United States v. Hutcheson*, supra at 232.

There is no evidence in this record to indicate that the minimum price lists were sought by the union as part of a conspiracy in which the union aided "non-labor groups to create business monopolies and to control the marketing of goods and services." *Allen Bradley v. Local 3, International Bhd. of Electrical Workers*, supra at 808. Nor is there any evidence which indicates that the increment to the personnel manager is unrelated to his costs in that



function. I conclude that the union's price lists do not violate the Sherman Act.

In recording and television, subleaders are apparently not used and the leader's fee would go to the actual conductor. It is perfectly permissible for the union to negotiate a minimum wage for leaders in these fields since they are employees.

The legality of the other acts charged to be violations of the antitrust laws may be considered without regard to the status of the plaintiffs as a labor group. In all of the following matters there is no evidence to indicate that the defendants acted other than independently in their own self-interest. *Allen-Bradley v. Local 3, International Bhd. of Electrical Workers*, supra at 811; *United States v. Hutcheson*, supra at 232.

#### VII. REFUSAL TO BARGAIN

The defendant unions do not bargain collectively either with orchestra leaders or purchasers of music in the club date single engagement field. Insofar as the antitrust laws are concerned, it is not illegal for a union to refuse to bargain with an employer or a group of employers. *Hunt v. Crumboch*, 325 U.S. 821, 16 LRRM 808 (1945). Therefore, even assuming that the orchestra leaders are employers in the single engagement field, defendants have committed no violation of law by failing to bargain with them.

#### VIII. IMPOSING MINIMUM EMPLOYMENT QUOTAS

The defendants have succeeded in imposing minimum numbers of men as requirements on various types of engagements. Minimum quotas are included within the exemption from the Sherman Act afforded by the definition of a labor dispute in the Norris-LaGuardia Act. *United States v. Carrozzo*, 37 F.Supp. 191 (N.D. Ill.), aff'd, 313

U.S. 539 (1941) (per curiam); United States v. AFM, supra.

### IX. REQUIRING ORCHESTRA LEADERS TO USE THE FORM B CONTRACT

The language of the Form B Contract describes the orchestra leader as an employee and the purchaser of the music as an employer. Its function is apparently to help establish this relationship in law. It also serves as a means of policing adherence to union scale, since the union requires that such contracts or, in the club date field, a report, be filed. The contract shows the price and terms of the engagement.

It is not clear how the use of the Form B Contract can result in a restraint of trade. In practice, the contract has failed miserably in fulfilling its primary purpose—making employees out of orchestra leaders.

The status of orchestra leaders in the club date single engagement field has been ruled on by courts on several occasions. In each instance the courts looked to all the factors which made up the employment relationship and concluded that the orchestra leaders involved there (Cutler, Carroll, Peterson) were employers. E.g., Cutler v. AFM, supra; Carroll v. Associated Musicians of Greater New York, supra; Cutler v. United States, supra. The Form B Contract was signally unpersuasive, "a self-serving subterfuge which is not entitled to any weight," according to Judge Lumbard, Cutler v. AFM, 316 F.2d at 548-49, 53 LRRM 2060. I can see no restraint of trade in the terminology in the Form B Contract referring to orchestra leaders as employees.

Nor does the requirement that the contracts be filed with the union violate the antitrust laws. The union has a legitimate interest in knowing the terms under which its members work and does not restrain trade in gathering this information.

## X. REGULATING BOOKING AGENTS AND CATERERS

### A. *Booking Agents*

The Federation instituted the licensing of booking agents and the fixing of maximum commissions at a time when the activities of booking agents were instrumental in depressing wages paid to union musicians below the union scale. Apparently, similar abuses by booking agents existed in other fields too. *Edelstein v. Gillmore*, 35 F.2d 723, 726 (2d Cir. 1929) (actors). The objective of the Federation was the elimination of the practices which undermined the musicians' wage structure and the regulations adopted were successful.

Booking agents are independent contractors not in job or direct wage competition with members of the defendant unions. Apparently, no court has had to decide the question of whether a group of independent contractors performing different functions than a union's members and not in competition with union members for jobs may be subjected to union regulations consistent with the antitrust laws.

In affirming the decision of the district court in *Los Angeles Meat Drivers Union v. United States*, *supra*, the Supreme Court was careful to note and repeat, *id.* at 103, the absence of "any actual or potential wage or job competition, or of any other economic interrelationship, between the grease peddlers [independent contractors] and the other members of the union." *Id.* at 98. On this basis it is safe to assert that economic interrelationships other than actual or potential job or wage competition will suffice to support a finding that a group of independent contractors are a labor group. *Id.* at 104 (Goldberg, J. concurring).

The scope of the exemption accorded to labor from the antitrust laws is determined by the definition of "labor dispute" in Section 13 of the Norris-LaGuardia Act, 29

USC § 113. *United States v. Hutcheson*, supra. Section 13(c) provides that such a dispute "includes any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." A person is "participating or interested in a labor dispute" under Section 13(b) if he "is engaged in the same industry, trade, craft, or occupation, in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation."

This definition of a labor dispute is the source of the test of actual competition or other economic interrelationship between independent contractors and union members for determining whether the former is a labor group that the union may regulate. *Los Angeles Meat Drivers v. United States*, supra; *Milk Wagon Drivers Union v. Lake Valley Farm Prods., Inc.* supra. Although job and wage competition may be the most common indicia of a labor dispute involving independent contractors, there is no reason why such competition should be the only criterion satisfying the Norris-LaGuardia definition.

Because the activities of the booking agents here have and had a direct and substantial effect on the wages of the members of defendants, I find that they are in an economic interrelationship with the members of defendants such that the defendants are justified in regulating their activities without contravening the Sherman Act. Furthermore, I find the regulations to be reasonably related to their interest in maintaining observance of union scale wages and working conditions.

### B. *Caterers*

Caterers, also independent contractors not in job or wage competition with union members, are in a unique position to affect the choice of orchestras by purchasers of music and the wages and working conditions of musicians. They have frequent contact with purchasers of music, control places where musicians perform and are relied on to arrange many aspects of the functions at which musicians perform.

The evidence discloses that caterers took advantage of their position before the union adopted its regulations to, in effect, book orchestras and they continue to do so, at least to some extent. Caterers recommend orchestras to customers and receive commissions from orchestra leaders. These practices actually or potentially affect the wages of the musicians involved.

I believe that this constitutes an economic interrelationship which permits the defendants to regulate and prohibit the booking activities of the caterers without violating the Sherman Act.

## XI. RESTRICTIONS ON TRAVELING ORCHESTRAS

Various AFM regulations favor the employment of local musicians rather than musicians from outside the jurisdiction. The principal incentive to employ local musicians is a requirement that "foreign" musicians be paid higher wages.

Local employment and working conditions have long been recognized as legitimate concerns of labor unions. See *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921). In the face of antitrust attack, courts have repeatedly sustained union regulations requiring a foreign employer to adhere to the shorter workday and the higher wage scale of the standards prevailing in his home local or the local where the work was



to be performed and to hire a specified percentage of his men from the latter local. *Rambusch Decorating Co. v. Brotherhood of Painters*, 105 F.2d 134, 4 LRRM 543 (2d Cir. 1939), cert. denied, 308 U.S. 587, 5 LRRM 693 (1939); *Barker Painting Co. v. Brotherhood of Painters*, 23 F.2d 743 (D.C. Cir. 1927), cert. denied, 276 U.S. 631 (1928); *Barker Painting Co. v. Brotherhood of Painters*, 15 F.2d 16 (3rd Cir. 1926), cert. denied, 273 U.S. 748 (1927).

The Second Circuit noted in *Rambusch*, *supra* at 138:

" \* \* \* Of course, the real point here relied on is the supposed discrimination between non-resident and resident contractors. Discrimination of this general kind is one of the most natural things in the world, applied by states and cities in civil service appointments; by courts in cost bonds and other burdens against non-residents; by merchants, customers, laborers, and servants in trusting and favoring the local man with whom they have long dealt and expect to deal in the future. \* \* \* "

I find no antitrust violation in the regulations here protecting local employment opportunities.

## XII. MONOPOLIZATION

Plaintiffs' claim that the defendant unions are attempting to or have monopolized the music industry boil down to the fact that the defendants are enforcing a closed shop. It is clear that this violates no antitrust law. *United States v. AFM*, *supra*; *Courant v. International Photographers of Motion Picture Industry*, 176 F.2d 1000, 24 LRRM 2510 (9th Cir. 1949), cert. denied, 338 U.S. 943, 25 LRRM 2265 (1950); *Kolb v. Pacific Maritime Ass'n*, 141 F.Supp. 264 (N.D. Cal. 1956).

In conclusion I find that defendants have violated no antitrust law. The complaints also allege the existence of a common-law restraint of trade. I find this charge to be equally without substance.

Although the defendants have successfully defended this suit, they are not entitled to attorneys' fees. 15 USC § 15; Talon, Inc. v. Union Slide Fastener, Inc., 266 F.2d 731, 739-40 (2d Cir. 1959); Alden-Rochelle, Inc. v. ASCAP, 80 F.Supp. 888, 899-900 (S.D.N.Y. 1948).

### CONCLUSIONS OF LAW

1. The defendant unions are labor organizations within the meaning of the Norris-LaGuardia Act, 29 USC §§ 101-113; the National Labor Relations Act, 29 USC § 151 et seq.; and the Clayton Antitrust Act, § 6, 29 USC § 17.
2. Defendants' motion to strike certain evidence, on which decision was reserved, is denied.
3. Plaintiffs Turecamo and Terry are no longer parties to this action.
4. Plaintiff Orchestra Leaders of Greater New York is not a proper party plaintiff and lacks standing to sue in this action.
5. The plaintiffs have failed to establish their claim to represent other orchestra leaders. Only the parties to the action will be affected by the decree.
6. There is job and wage competition and other economic interrelationships, significantly affecting defendant's legitimate union interests between plaintiffs in the club date single and hotel steady engagement fields and other employee-members of defendant unions who perform services as subleaders and sidemen in the club date and hotel steady engagement fields.
7. The plaintiffs are employees of the recording companies and television broadcasters when they perform services for them.
8. The plaintiffs constitute a "labor" group.

9. The defendant unions may legally pressure the plaintiffs into becoming members.

10. None of the defendants' regulations and practices complained of by plaintiffs constitute a violation of the federal antitrust laws (15 USC §§ 1 et seq.) or a common-law restraint of trade. They all come within the definition of the term "labor dispute" in the Norris-LaGuardia Act, 29 USC § 113, and are exempt from the antitrust laws.

11. The complaints in these actions should be dismissed and judgments entered for defendants, with costs to defendants.

**APPENDIX C****Statutory Provisions Involved**

Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 1 provides in pertinent part as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal:

• • •

Section 6 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 17 provides:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 20 of the Clayton Act, 38 Stat. 738, 29 U.S.C. § 52 provides:

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there

is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person, or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Section 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 104 provides:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;



(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peacefully to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

Section 13 of the Norris-LaGuardia Act, 47 Stat. 73, 29 U.S.C. § 113 provides:

When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation;

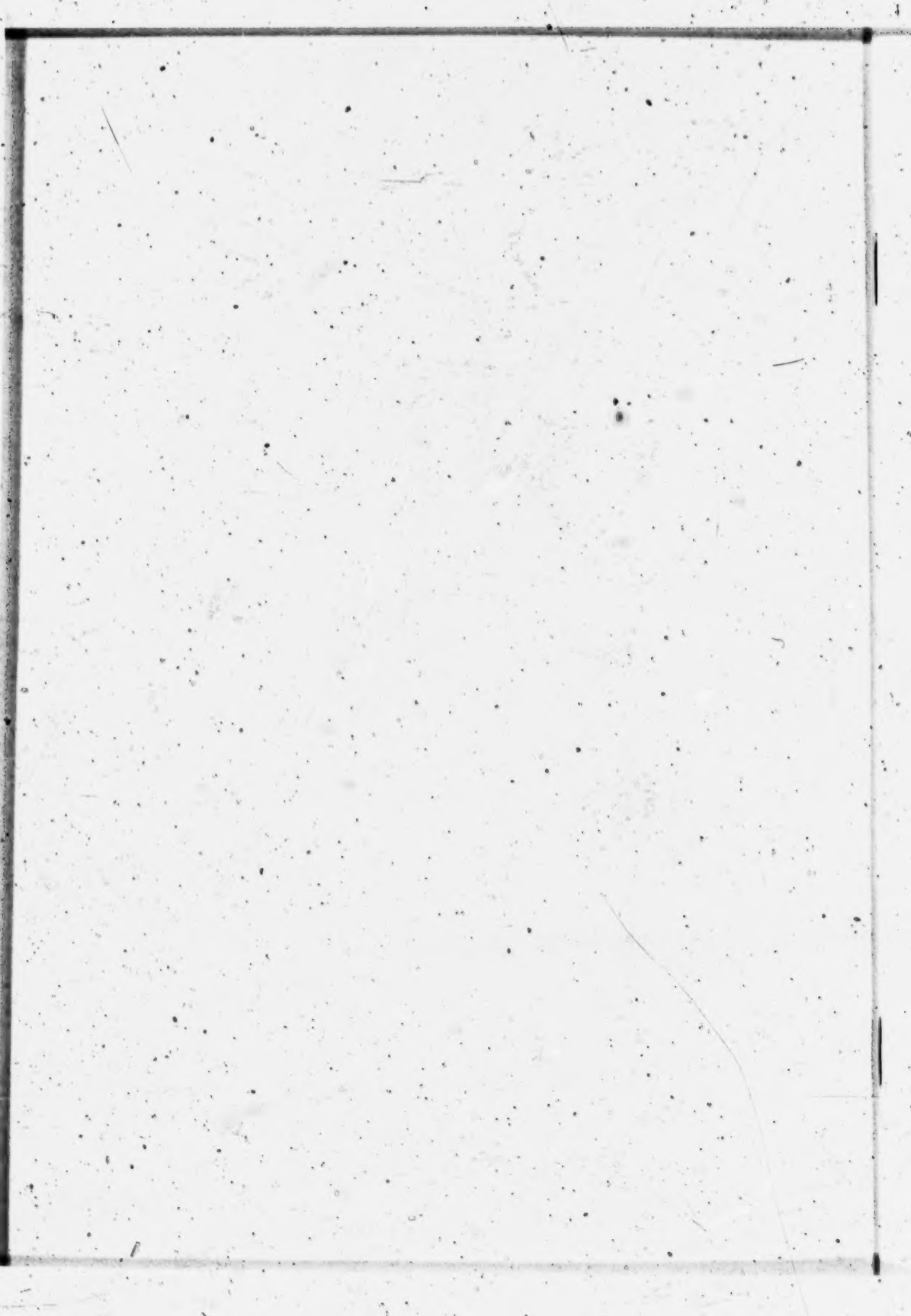
or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the court of the District of Columbia.





**AUG 24 1967**

IN THE  
**Supreme Court of the United States**

**JOHN F. DAVIS, CLERK**

**OCTOBER TERM, 1966**

**No. ~~310~~ 309**

**JOSEPH CARROLL, CHARLES PETERSON and CHARLES TURE-  
CAMO, as Treasurer, Orchestra Leaders of Greater New  
York,**

**Plaintiffs-Respondents,**

*against*

**AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES  
AND CANADA, etc., et al.,**

**Defendants-Petitioners.**

**CROSS-PETITIONERS' BRIEF IN OPPOSITION TO PETI-  
TION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND  
CIRCUIT**

**GODFREY P. SCHMIDT,  
Attorney for Plaintiffs-Respondents,  
100 West 42nd Street,  
New York, N. Y. 10036.**

**ANTHONY J. SHOVELSKI,  
Of Counsel.**



## TABLE OF CONTENTS

---

	PAGE
Opinions Below .....	1
Jurisdiction .....	2
Questions Presented .....	2
Counterstatement .....	2
Summary of Argument .....	9

### ARGUMENT:

POINT I—The Court below did not find cross-petitioners to be members of a labor group; and petitioners' suggestion to the contrary is error .. 10

POINT II—The record demonstrates that petitioning unions enforced their minimum price and other commercially restrictive union bylaws in combination with various non-labor groups ..... 11

POINT III—The record exhibits no instance of competition between *working employers* and sidemen or subleaders who are members of petitioning unions; and, in any event, no cross-petitioner is a working employer in the sense of working as a sideman or a subleader ..... 15

POINT IV—The references in the decisions of the Courts below to job and wage competition and other economic interrelationship between musicians who perform as leaders on club dates and other musicians admittedly employees are irrelevant; since they refer not to professional orchestra leaders like petitioners but to 95% of all AFM members who perform at one time or another as "orchestra leaders," but who are not professional orchestra leaders ..... 18

POINT V—*Price-fixing* whether effectuated by unions alone or by unions in combination with non-labor groups is violative of the antitrust laws ..... 19

	PAGE
Allen-Bradley Co. v. Local Union No. 3, 325 U. S. 797 (1945) .....	20, 21, 24, 25
American Federation of Musicians, Don Glasser and George Doerner, 165 N.L.R.B. No. 110 .....	8
Apex Hosiery Co. v. Leader, 310 U. S. 469 (1940) ..	19, 20
Associated Musicians, Local 802 and Ben Cutler, 164 N.L.R.B. No. 8 .....	8
Bakery & Pastry Drivers v. Wohl, 315 U. S. 769 (1942)	15
Bartels v. Birmingham, 332 U. S. 126 (1950) ....	8
Carroll v. AFM, 206 F. Supp. 463 (affirmed 316 F. 2d 574 (1963)) .....	8, 9
Carroll v. AFM, 206 F. Supp. 462, reversed by divided opinion, 310 F. 2d 325 (C. A. 2, 1962) .....	9
Cutler v. AFM, 231 F. Supp. 845 (affirmed 316 F. 2d 546, certiorari denied 375 U. S. 941 (1963)) ....	7
Cutler v. United States, 180 F. 2d 360 .....	8
Fibreboard Paper Products Corp. v. N.L.R.B., 379 U. S. 203 (1964) .....	22
Local Union No. 189 v. Jewel Tea Co., 381 U. S. 676 (1965) .....	23, 24
Los Angeles Meat Drivers 371 U. S. 94 (1962) ..	10, 21, 23
Meat Drivers Union v. U. S., 271 U. S. 94 .....	16
Milk Wagon Drivers v. Lake Valley Products, 311 U. S. 91 .....	15
N.L.R.B. v. Borg-Warner Corp., 356 U. S. 342 (1958) .....	17, 18
Republic Productions and Chicago Federation of Musicians, 153 N.L.R.B. No. 11 .....	8
Senn v. Tile Layers Union, 301 U. S. 476 .....	16
Teamster Union v. Oliver, 358 U. S. 283 .....	15

## TABLE OF CONTENTS

iii

	PAGE
United Mine Workers v. Pennington, 381 U. S. 657 (1965) .....	21, 23, 25
U. S. v. Hutcheson, 312 U. S. 219 (1941) .....	20

### STATUTE CITED

Taft-Hartley Act, §§ 8(b)(4)(A) .....	16
---------------------------------------	----

### MISCELLANEOUS AUTHORITIES

Conference Report, No. 510, 80th Congress, First Session, House of Representatives .....	16
Labor Relations Yearbook, 1965, Bureau of National Affairs, p. 119 at p. 122 .....	24

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1966

---

No. 310

---

---

JOSEPH CARROLL, CHARLES PETERSON and CHARLES TURE-  
CAMO, as Treasurer, Orchestra Leaders of Greater New  
York,

Plaintiffs-Respondents,

*against*

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES  
AND CANADA, etc., et al.,

Defendants-Petitioners.

---

**CROSS-PETITIONERS' BRIEF IN OPPOSITION TO PETI-  
TION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND  
CIRCUIT**

---

**Opinions Below**

The opinion of the Court of Appeals for the Second Circuit is reported at 372 F. 2d 155 and is reprinted in Appendix A of the defendants' Petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, pages 1a-27a. The opinion of the District Court for the Southern District of New York is reported at 241 F. Supp. 865 and is reprinted in Appendix B of said Petition, pages 28a-82a.

## Jurisdiction

The judgment of the Court of Appeals was entered January 30, 1967. On April 26, 1967, Mr. Justice Harlan entered an order herein extending the time to file Petition for certiorari and the Cross-Petition to June 30, 1967. Jurisdiction of this Court was invoked under 28 U.S.C. § 1254(a).

## Questions Presented

The questions presented by cross-petitioners are set forth in the Cross-Petition, pages 2-7. The first question presented by petitioners (P. p. 2) is irrelevant, since it *assumes* what the record contradicts, *i.e.*, that petitioners did not combine with non-labor groups.

## Counterstatement

Most of the relevant facts have already been set forth in the Statement contained in the Cross-Petition. However, erroneous and tendentious fact allegations contained in the Petition require correction or clarification.

There are more than 200 AFM Locals (out of the total of 680) which have orchestra-leader-employers *as officials, many of them elected officials*. At the most recent AFM Convention (June, 1967), there were in attendance as union delegates many leader-employers.

Leaders operate in every State of the Union, and in and from every important city thereof. There are in the AFM some 5,000 full-time professional orchestra-leader-employers.

Cross-petitioners estimate that there are some 400 professional orchestra-leader-employers in Local 802. However, out of the total of 400 professional orchestra leaders



in Local 802, less than 40 do enough business to meet NLRB jurisdictional "yardsticks". On a minimum average, each of these 400 professional orchestra leaders regularly employs 5 key or "first-string" sidemen. Allowing for some degree of overlapping of employment of the same sidemen by different leaders, there are between 2,000 and 2,500 active employee musicians in Local 802. Out of a total membership of 30,000 in Local 802, less than 5,000 are functionally and regularly incardinated in the industry. The rest, numbering approximately 25,000, play engagements occasionally, some very rarely, some not at all. Of the 30,000, not more than 1,500-2,000 are employed on *steady engagements*. The rest are in the single engagement field. The professional leaders work both single and steady engagements.

Single engagements and steady engagements comprise the entire field of musical engagements. Steady engagements number less than 2% of all musical engagements. The Local 802 "Price Lists" (e.g., Plaintiffs' Exhibit 366, pp. 5-8) give an exhaustive roster of *single* and *steady* engagements, differentiating between the two. That list shows about 100 types of single engagements (most of which cross-petitioners and the class represented by them are qualified and seek to play). About 90 of these types of single engagements are neither "club dates" nor steady engagements.

The complaints here were not confined to "club dates". Cross-petitioners challenged the right of unions to fix prices in both the single and steady engagement fields; that is to say in the entire field of musical engagements.<sup>1</sup> Nothing in the complaints or record suggests that the cross-petitioners' attempt to prohibit lawful union regula-

---

<sup>1</sup> Petition (hereinafter abbreviated "P."), pp. 2-3: "The Court of Appeals \* \* \* held that petitioning unions may not determine the price which their member, a musician known as a leader, must charge to the purchaser of the music on certain engagements known as 'club dates'."

tions designed to protect the jobs and wage standards of employee members (P. p. 2).

The description<sup>2</sup> given in the Petition is a travesty on the real situation. Professional orchestra-leader-employers like plaintiffs have established businesses; have their own offices; often have office employees; and always have a nucleus of key employee-musicians whom they *regularly* use. As Judge Levet found, they organize their own bands; maintain and pay steady and part-time employees; acquire business as a result of their own contacts, reputation and personal solicitations; engage in and pay for advertising. Their names are prominently displayed wherever their orchestras perform; they negotiate and sign contracts of engagement with their clients, the purchasers of music; they usually lead or conduct their own orchestras; they appoint subleaders to lead them, when they do not do so themselves. They decide how their orchestras are to render their pieces; choose the tempo and decide the dynamics, tone coloring, volume, syncopation, if any, and other characteristics of the musical styles of their orchestras. They decide, subject to union minimum requirements, on the number and qualifications of sidemen who play in their orchestras. They call for rehearsals, when necessary; train employees in those rehearsals; correct and discipline sidemen; and devote their full time to their profession as orchestra leaders. Most of them *never* serve as sidemen; a few do so rarely, usually as an accommodation to a fellow orchestra leader. They pay all expenses connected with performances by their orchestras, including sidemen's salaries, uniforms (if any), mileage fees, cartage fees, food and lodging, sheet music racks, special arrangements of

---

<sup>2</sup> "Normally the purchaser of the music \* \* \*, approaches a musician with a request for a specified number of instrumentalists at a particular time and place. This musician thereby becomes the 'leader', who obtains the other musicians who perform the engagement. \* \* \*" The "leader" who "becomes" such for a particular engagement is not a full-time, professional orchestra leader; and he is not in the class represented and typified by Cross-Petitioners.

music to be played by their orchestras, etc. The difference between the prices they charge and their expenses constitutes their profit. They always pay for workmen's compensation, unemployment insurance, etc., coverage of their employees, unless the AFM or 13 Locals interfere by *requiring particular purchasers of music* to assume these obligations under threat of union reprisals.

The casual and preposterously inadequate manner in which petitioners depreciate orchestra-leader-employers suggests the advisability of quoting relevant statistics from the Bureau of Census, U. S. Department of Commerce. The Bureau's classification of "Dance Bands, Orchestras, except Symphony" includes "dance bands, orchestras, combos, quintets and similar instrumental organizations, presenting popular music on a contract or fee basis for private dances, restaurants, nightclubs, radio and television programs, etc." The latest figures available are for 1963. The total number of such instrumental organizations for that year was 5,118. Of this total, 4,999 were operated by "Active proprietors of unincorporated businesses." The gross income or receipts of these dance bands and orchestras was \$86,323,000 for the year 1963; and their total payroll for the same year was \$48,237,000.

For the year 1958 (the next earlier year for which Commerce Department figures were available), the total number of dance bands and orchestras was 6,750. Of this total, the number of controlling "Active proprietors of unincorporated business" was 5,582. The gross income or total receipts of these bands and orchestras in 1958 was \$82,369,000; and the total payroll was \$40,194,000.

Thus, the number of orchestras and bands *decreased* from 1958 to 1963. That decrease has continued to the present time according to the experience of cross-petitioners, because of the restrictive commercial practices of petitioning unions. If anything, the rate of decrease accelerated from 1963 to 1967.

The Bureau's "Standard Metropolitan Statistical Area" (SMSA) for the 1963 statistics included New York City, Nassau, Rockland, Suffolk and Westchester Counties in the State of New York. The "Dance Bands, Orchestras, except Symphony", in that area for 1963 numbered 450 in all. Of these 415 were "Active proprietors of unincorporated businesses". The total receipts of these New York dance bands and orchestras was \$25,697,000; and their total payroll was \$13,100,000.

The 1958 figure was complicated by reason of the fact that the "Standard Metropolitan Statistical Area" for that year included, in addition to the New York State counties named above, the following counties of the State of New Jersey: Bergen, Essex, Hudson, Middlesex, Morris, Passaic, Somerset and Union. For this larger statistical area, the Department of Commerce figures for 1958 showed 587 dance bands and orchestras; of which 528 were "Active proprietors of unincorporated businesses". The total receipts of all of the dance bands in this extended area were \$17,082,000 in 1958; and the payroll was \$7,998,000.<sup>3</sup>

It appears from the foregoing that the musical industry (excluding theatre, symphony, radio and television portions thereof in which only a minuscule number of orchestras and musicians play) is characterized for the most part by small, independent employers (professional orchestra-leader-employers). These have allowed their negotiation rights to be usurped by AFM Locals (usually the Executive Boards thereof) and by certain leader-employers who are union officials or union collaborators for the purpose, among other things, of aiding unlawfully assisted AFM unions and for the purpose of creating and enforcing union-prescribed wages and working conditions; since collective bargaining, and other rights pro-

---

<sup>3</sup> The foregoing material and statistics were furnished by Harvey Kailin, Chief, Business Division, Bureau of Census by letter dated August 4, 1967.

tected by NLRA, are unknown in the largest area of this industry.

Most of the orchestra-leader-employers in the industry cannot meet NLRB jurisdictional standards. The figures supplied by the Bureau of Census, quoted above, show the average income of the dance bands and orchestras for the year 1963 was about \$16,000. Moreover, as contrasted with other industries where the Board has declined jurisdiction or where the act expressly precludes Board jurisdiction, employer-employee-union relationships in the musical industry are exempt, under the doctrine of preemption, from State regulation.

Local 802 does have members who are more or less regularly sidemen, but who on infrequent occasions (1-10 times a year) desert their status as sidemen in order to improvise as "leaders". Some 90% of the persons who, as AFM and Local 802 members, file engagement contracts with the latter union are just such *occasional* "orchestra leaders". However, *they are not professional leaders in the class claimed by cross-petitioners or plaintiffs; they do not, like plaintiffs, earn all or a substantial portion of their livelihoods from serving as orchestra leaders; they have no organizations with reputations as such.* Plaintiffs (and other orchestra-leader-employers like plaintiffs) are not to be placed in the same category as this vast majority of "leader"-members, whose earnings from service as "leader" are negligible each year. Such "leaders" do not *regularly* constitute a "non-labor group"; even though they *occasionally* act as independent contractors. Courts and Boards have never found any difficulty in categorizing persons like plaintiffs as true employers. The District Court's decision was the very first which ever placed *employers* in a "labor group".

*Cutlér v. AFM*, 231 F. Supp. 845 (affirmed 316 F. 2d 546, certiorari denied 375 U. S. 941 (1963));



*Carroll v. AEM*, 206 F. Supp. 463 (affirmed 316 F. 2d 574 (1963));

*Cutler v. United States*, 180 F. 2d 360;

*Bartels v. Birmingham*, 332 U.S. 126 (1950);

*Associated Musicians, Local 802 and Ben Cutler*, 164 N.L.R.B. No. 8;

*American Federation of Musicians, Don Glasser and George Doerner*, 165 N.L.R.B. No. 110;

*Republic Productions and Chicago Federation of Musicians*, 153 N.L.R.B. No. 11.

Petitioners also misrepresent the price ingredients which they prescribe in their bylaws.<sup>4</sup> The minimum prices mandated by defendant unions were never merely "the aggregate of the minimum compensation of sidemen and leaders." See Plaintiffs' Exhibit 388, where petitioners *admitted* that the following are the union-required, indispensable ingredients of their unilaterally imposed minimum prices for musical engagements: (1) The involved wages of employee-musicians; (2) cost (which always includes higher profit to the orchestra leader) of complying with the minimum-number-of-musicians unilaterally mandated for the particular place of engagement by the Local 802 Executive Board (and published in the Local 802 "Minimums Book"); (3) minimum "leader's fee" unilaterally fixed by defendant unions (as the orchestra-leader-employer's minimum income or profit); (4) "minimum mileage fees" unilaterally fixed by defendant unions which leader-employers *must* charge their clients; (5) 8% price addendum (formerly 7%) required by the Local 802 Price List, as further *minimum income to orchestra-leader-employers*; (6) minimum cartage charges which orchestra-leader-employers *must* charge clients; (7) cost of uniforms, where uniforms are required; (8) cost of transportation,

---

<sup>4</sup> P. p. 5: Petitioners speak of union regulations which "require the leader to charge the purchaser of the music a minimum price which is not less than the aggregate of the minimum compensation paid to sidemen and leaders."

according to certain transportation standards unilaterally fixed by defendant unions; (9) cost of food and lodging; and (10) 10% traveling surcharge (effective to January 1, 1964 and enforced by defendants for more than a year afterwards) where the engagement was played outside the home local's jurisdiction. Since January 1, 1964, petitioners have attempted to maintain the 10% differential under a price addendum with a different name: "Musical Engagements Wage Differential" (Article 15, AFM Bylaws).

Obviously, many of the 10 items just listed are not *compensation* for either sideman or leader who, as an employer, derives a *profit*, not *wages*, from his engagements.

Cross-petitioners Carroll and Peterson were, despite misstatement in the Petition (P. p. 6, footnote 6), expelled from defendant unions for reasons related to this litigation. See *Carroll v. AFM*, 206 F. Supp. 462, reversed by divided opinion, 310 F. 2d 325 (C.A. 2, 1962). The District Court clearly found that Carroll and Peterson were expelled as a reprisal for the institution of the instant antitrust suits; and the Court of Appeals, in reversing, did not disturb Judge Levet's findings of fact in this respect.

### Summary of Argument

The Court below did not find cross-petitioners to be members of a "labor group". The record demonstrates that petitioning unions enforced their bylaws (requiring minimum prices, suppression of competition and other monopolistic practices) in combination with various non-labor groups.

No instance of competition between cross-petitioners as "working employers" and employee-musicians appears in the record. Cross-petitioners are "working employers" only in the sense that *all employers perform work characteristic of their employer status*—work which is a prerequisite to an employer's ability to supply jobs and to pay wages. The references in the decisions of the courts

below to "job and wage competition and other economic interrelationship" are irrelevant since they concern non-professional "orchestra leaders" who irregularly and only occasionally "organize" and "conduct" orchestras. They do not pertain to full-time professional orchestra leaders in the small class represented by cross-petitioners. Further, such references are unreasonable expansions of union rights and powers, based upon erroneous, exaggerated interpretation of this Court's *dictum* in the terminal paragraph of the *Los Angeles Meat Drivers* case. Ninety-five percent of all AFM members who file engagement contracts as "orchestra leaders" perform as such less than 10 times a year. They do not earn their livelihoods from functioning as "orchestra leaders". They are really sidemen or employee-musicians by profession rather than veritable professional orchestra leaders who are either *employers* or independent contractors. To take the said diffuse *dictum* from this Court's *Los Angeles Meat Drivers* case literally would be to subject all employers as well as employees to union organizing drives; because there is always some "economic interrelationship" between employees and employers in every industry.

In any event, price-fixing imposed upon a whole industry, whether effectuated by unions acting alone or by unions in combination with non-labor groups (as here), is violative of the antitrust laws.

## ARGUMENT

### POINT I

**The Court below did not find cross-petitioners to be members of a labor group; and petitioners' suggestion to the contrary is error.**

Misreading the decision of the Court of Appeals, petitioners aver that the Court below had found orchestra-leader-employers to be members of the "labor group" (P.

pp. 3, 4, 7, 8, 9, 10, 11). Nowhere in its decision did the Court of Appeals aggregate leader-employers to a "labor group". That Court eschewed all discussion of "labor group", or "non-labor group", because it did not think *Allen-Bradley* applicable.

## POINT II

**The record demonstrates that petitioning unions enforced their minimum price and other commercially restrictive union bylaws in combination with various non-labor groups.**

Because petitioners include in their membership many orchestra-leader-employers, they are in effect, and to some extent function as, *an association of independent and otherwise competing entrepreneurs and employer-businessmen* who use the association to further their own purposes or interests of preventing free competition at prices below those fixed by petitioning unions; who actively participate in union policy making, and who enforce monopolistic policies which injure the public as well as the cross-petitioners. Thus, association of leader-employers with petitioning unions involves combination and agreement between them concerning prices of, and employer profits from, musical engagements.

Petitioners' "Form B" contract sets forth, among other things, the minimum *price* (no matter how disguised as "wages") which Union bylaws require the orchestra leader (whether employer or independent contractor) to observe. A purpose or effect of the "Form B" contract and the Union's mandate that it be filed is the elimination of price competition between orchestra-leader-employers and between booking agents.

The combination or agreement between petitioning unions and associated leader-employers and leader-inde-

pendent-contractors has resulted in the making and application of many arbitrary rules unreasonably restricting commerce and governing the number of musicians required for particular engagements. Many leader-employers, for example, who subscribe to and enforce such employment-quota rules, act in their own immediate interests; because thereby they increase the *minimum price* (which the purchaser must pay) and proportionately their own *minimum profit*. The leader-employer must receive the 8% addendum or "surcharge" prescribed by Local 802 bylaws. The higher the price of the engagement because of employment-quota rules, the higher the surcharge<sup>5</sup> paid to the leader-employer. If, in addition, the engagement is for a *traveling orchestra*, there was the former 10% traveling surcharge and there is now the 10% "traveling orchestra wage differential", as prescribed in the different versions of Article 15 of the AFM Bylaws before and after January 1, 1964.

All of these arbitrary union bylaws (which restrict competition and fix prices) are enforced against orchestra leaders and the public by petitioning unions in combination with many types of employers, including the associated leader-employers who are union members and booking agents, who, generally, are not union members. The sanctions prescribed in the AFM bylaws and the Local bylaws are fines up to \$5,000, suspension and/or expulsion. The consequence of expulsion is the effective removal of the penalized leader-employer or leader-independent-contractor from competition in the business of furnishing live musical services.

Thus, petitioners and the associated orchestra-leaders and licensed booking agents by their agreement, combination or conspiracy have monopolized trade and commerce

---

<sup>5</sup> If the total wage of 5 musicians is \$250 and for 10 musicians is \$500, then eight percent of \$250 is \$20; while 8% of \$500 is \$40.



in the musical industry by various practices, actions and methods, including:

(1) Promulgation and enforcement of union rules, and institutionalization of union practices, which required all orchestra leaders to be members of AFM and of the very Locals which organized their employees.

(2) AFM has promulgated bylaws approved and enforced by Local 802, by numerous union-member-leader-employers and by booking-agent-employers, which require all booking agents to obtain a license from the AFM to book musicians and operate as such. Said union laws require booking agents to sign the so-called Booking Agent Agreement, which provides that AFM may prescribe the terms and conditions of any contract between a booking agent and an AFM member; and which prohibits booking agents from arranging employment of non-members or of any musician in violation of the bylaws of AFM and its Locals (including those which restrain trade and commerce and which fix minimum prices).

(3) The petitioning unions, the associated leader-employers, the associated independent-contractor-leaders, and the licensed booking agents approve and enforce universal use of the "Form B" contract, which incorporates by reference the constitution, bylaws and regulations of AFM and of all AFM Locals (including those which fix prices and restrain competition).

(4) Petitioning unions and the said associated orchestra-leaders and booking agents approve and enforce use of boycotts, usually by *unfair lists*, which name (i) purchasers who make use of the services of leaders or other musicians who are not AFM members or who allow leaders to perform upon the basis of contracts not approved by the involved AFM Local or upon the basis of contracts other

than the "Form B" contract prescribed by Article 13 § 33 of the AFM Bylaws; (ii) orchestra leaders who are expelled or suspended and boycotted; (iii) booking agents whose AFM licenses have been suspended or who are boycotted; (iv) hotels, dance halls, restaurants, caterers who tolerate musicians who are not union members in good standing or who tolerate purchasers like those described in item (i) *supra*. No AFM member is permitted to play an engagement for any purchaser, orchestra leader or booking agent on the unfair list; and no booking agent is permitted to contract for such purchaser or orchestra leader. The unfair list is published regularly in the International Musician and in the official publications of the various AFM Locals.

Thus, the claim that petitioning unions do not conspire or combine with non-labor groups is groundless; because petitioning unions' activities are not "independent" (P. p. 12); and even if there were no actual *conspiracy*, there was certainly *combination* with non-labor groups to fix and enforce prices, to create business monopolies and to control the marketing of services (P. p. 7). In addition to the combination with leader-employers who willingly or under duress enforce Local 802 minimum *prices*, there is combination or contract with the owners of hotels, night-clubs, restaurants and with caterers to enforce *wages* and other restrictive union regulations against leader-employers who were not privy to the making of such contracts or combinations. The lessees and guests of hotels, night-clubs, restaurants and catering establishments are also constantly told that Local 802 minimum *prices* and other union rules must be enforced; and the ensuing contracts, whether written or oral, constitute agreements or combinations between labor and non-labor groups to furnish the predicates for Sherman Act violations (P. p. 10).

### POINT III

The record exhibits no instance of competition between *working employers* and sidemen or subleaders who are members of petitioning unions; and, in any event, no cross-petitioner is a working employer in the sense of working as a sideman or a subleader.

Petitioners, with manifest hyperbole, claim that the Court below "has nullified the right of unions to protect their employee members from evasion of union wage standards by competition from working employers \* \* \*" (P. p. 12). In this connection, petitioners rely on *Milk Wagon Drivers v. Lake Valley Products*, 311 U. S. 91. However, in that case, the so-called "independent contractors" were really *employees* and were actually designated as such in the labor contracts between the involved employer and union.

Petitioners also lean on *Bakery & Pastry Drivers v. Wohl*, 315 U. S. 769 (1942). In that case none of the so-called "independent contractors" was an *employer*. Each had originally been an employee working for the same bakery wholesaler whose products they sold afterwards as alleged independent contractors. If they were genuinely "self-employed", they may have been in a "labor group". But the case itself made no ruling on that point. It turned on an unconstitutional curtailment of speech by a State court injunction. Also, the case came *five years before the Taft-Hartley Act*, which in the language of the House Conference Report No. 510 on H. R. 3020 expanded § 8(b)(4) to prevent "concerted activity by a union or its agents to compel an employer or self-employed person to become a member" (p. 45).

*Teamster Union v. Oliver*, 358 U. S. 283, concerned *wages*, not "price-fixing", as the decision itself pointed out at page 294.

*Meat Drivers Union v. U. S.*, 271 U. S. 94, held that *independent-contractor* grease peddlers, who did exactly the same kind of work as *employee* grease peddlers were not properly members of the employees' union. *A fortiori*, orchestra-leader-employers (who are genuine employers of many employees during the course of a year) have no proper place in the same union which has organized their employees; especially since their work as leaders is different from that of employee musicians.

*Senn v. Tile Layers Union*, 301 U. S. 476, was nullified by Congressional amendment, the Taft-Hartley Act, §§ 8 (b)(4)(A), as the involved Conference Report (No. 510, 80th Congress, First Session, House of Representatives) demonstrates.

The record shows no competition whatever between any cross-petitioner and any sideman, or between any professional orchestra-leader-employer (the only type of person represented by petitioners) and any employee musicians. No cross-petitioner works as a sideman.

We will have taken a long step in the direction of tyranny and unequal protection of law if, by statute or by case law, *an employer's right to work as such* is not regarded as at least on a par with the employee's right to work as such; or if it is subjected to the pretensions to power of labor union leaders or is sacrificed to some strange idol of the primacy of the workers' right to work. The employer's right to work as an employer is, in principle, as valid as the right to work as employees. In economic appraisal, it is more valuable; since the employer's work makes jobs possible for employees. Unless the employer can enjoy the right to be a working employer (i.e., to do the work which an employer needs to do and which brought him to the status of an employer, capable of supplying jobs) is protected against the arbitrary suppression of union leaders, the employer's ability to provide jobs is either lost or gravely curtailed.



Most orchestra leaders who reach the stage where they can make a profession of leading orchestras do so upon the basis of their virtuosity *as a leader who leads while playing an instrument*. To deprive them of the opportunity to lead in this fashion and of the instrument of leadership is to rob them of the key to their success.

This discussion concerns only *professional* orchestra leaders; that is to say orchestra leaders like cross-petitioners who earn their livelihoods as such and who rarely, if ever, work as sidemen. (When they do so, once or twice a year, it is usually as an accommodation for a fellow orchestra leader.) Ninety-five percent of so-called "orchestra leaders" work as such only occasionally and not professionally. This discussion does not involve that 95%, who are unable to earn their livelihoods as orchestra-leader-employers.

Many *collective bargaining agreements* (there is no such agreement here) limit the performance of *production work by foremen or supervisory employees*. Foremen who work take work from rank-and-file union members. Leader-employers do not take work from, they supply work to, employee musicians. Moreover, the employers who negotiate the "many agreements [which] limit the performance of production work by foremen" are not coerced into union membership. Nor is it correct to state (as do petitioners) that the provisions concerning working foremen "are inserted to prevent persons who are not subject to the terms of the agreement from doing work which the union believes should be done by its members." A more correct statement is these provisions are inserted to prevent persons from doing work which the union and the employer *agree* should be done only by persons in the bargaining union unit.

In *NLRB v. Borg-Warner Corp.*, 356 U. S. 342 (1958), this Court held that neither the "ballot clause" (a contract proposal made by employer to the effect that there



could be no strike unless the employees were first balloted on employer's last proposal) nor the "recognition clause" (an employer's proposal that the Local union rather than the International be recognized, despite certification of the International) came within the ambit of the statutory phrase: "wages, hours and other terms and conditions of employment." Therefore these two clauses were not mandatory subjects of bargaining. *A fortiori*, an employer's right to work *as an employer* is not a matter that comes within the statutory designation "wages, hours or other terms and conditions of employment." Therefore, the Court of Appeals was correct in holding that an orchestra leader's right to lead by playing his instrument is not a mandatory subject for collective bargaining.

#### POINT IV

**The references in the decisions of the Courts below to job and wage competition and other economic inter-relationship between musicians who perform as leaders on club dates and other musicians admittedly employees are irrelevant; since they refer not to professional orchestra leaders like petitioners but to 95% of all AFM members who perform at one time or another as "orchestra leaders," but who are not professional orchestra leaders.**

Petitioners frequently refer to the large number of occasional, non-professional orchestra leaders who do not derive their livelihood or any substantial portion of their livelihood from functioning as orchestra leaders. The instant cases concern professional full-time orchestra leaders like cross-petitioners, who derive their livelihoods from their profession. Non-professional "orchestra leaders" perform only 10% of the musical engagements for which contracts are filed with AFM Locals; while professional orchestra leaders like cross-petitioners, who number less than 5% of all orchestra leaders filing contracts, contract

for 90% of all musical engagements. (See Defendants' Exhibits, J, K, L and M.)

Petitioners themselves admit that (p. 4): "A considerable number of musicians act only occasionally as leader, and act as sidemen the rest of the time, competing with each other and with full-time leaders for engagements." Cross-petitioners are, of course, not concerned with this considerable number (about 95%) of "leaders". There is not a jot of evidence in the record to show that full-time professional orchestra leaders like plaintiffs<sup>6</sup> ever competed with any member of the large group of occasional leaders *for engagements*. Purchasers of music are not generally attracted by the unrepented, occasional "leader" who in a sporadic, desultory fashion acts as such a few times a year.

## POINT V

***Price-fixing whether effectuated by unions alone or by unions in combination with non-labor groups is violative of the antitrust laws.***

Cross-petitioners have been unable to find any case which ever validated the attempt of a union, whether acting alone or in combination with non-labor groups, "to enforce illegally fixed prices" for an entire industry.

(1) In *Apex Hosiery Co. v. Leader*, 310 U. S. 469 (1940), this Court read the Sherman Act as designed to prevent "restraints to free competition in business and commercial transactions which tended to restrict production, raise prices, or otherwise control the market to the detriment of purchasers or consumers of goods and services \* \* \*." (Emphasis added.) That case according to Mr. Justice

---

<sup>6</sup> It is erroneous to state or suggest that cross-petitioners have conceded that "in other parts of the music industry \* \* \* the leader is concededly an employee" (p. 4).

Stone was *not* a case "of a labor organization being used by combinations of those engaged in an industry as the means or instrument for suppressing competition or fixing prices." In the instant cases, however, many leader-employers (all those who comply with and enforce petitioning unions' fixed prices) use AFM and its Locals as means for suppressing competition and for enforcing minimum prices. Whether the unionized employers *make use of the union* to suppress competition and to fix prices or whether the union *makes use of the unionized employers* to suppress competition and fix prices; the detriment to purchasers of musical services is the same in each case; as is the Sherman Act violation.

In *Apex* this Court recognized that there is an intimate economic relationship between wages, hours and working conditions on the one hand and prices on the other; but this incidental and inevitable effect of *collective bargaining agreements* on commercial competition was free of antitrust liability (*Apex* case, at 503-04, 504 n. 24). In the instant cases, petitioners never engaged in collective bargaining with orchestra-leader-employers. Thus *Apex* (at pp. 503-04, 504 n. 24) is unavailable to excuse or justify petitioning unions' conduct here; because they did combine with management (e.g., many orchestra leaders and booking agents) in eliminating competition from the commercial market for musical services. That is why both the facts and the rule of the later *Allen-Bradley Co. v. Local Union No. 3*, 325 U. S. 797, are applicable here; even though the *facts* and *rule* of that case are not precisely consistent.

(2) In *U. S. v. Hutcheson*, 312 U. S. 219 (1941), this Court directed its attention to the question "Whether the use of conventional, peaceful activities by a union in controversy with a rival union over certain jobs is a violation of the Sherman law \* \* \*." There is here no controversy with a rival union; and petitioning unions do not use "conventional," peaceful activities.

Petitioners here engage in a crude conspiracy to drive out of business those leader-employers who refuse to abide by union prices. This was unlawful long before 1890; and it has been unlawful ever since. Such union conduct is not exempted from the antitrust laws and should not be. This is merely using "wages, hours and working conditions" as a pretext for flagrantly violating the Sherman Act and as a shield for acquiring undeserved protection from clear liability. Petitioning unions prate of collective bargaining to preserve wages, hours and working conditions, while they baldly repudiate collective bargaining.

(3) *Allen-Bradley Co. v. Local Union No. 3* (325 U. S. 797 (1945)), answered affirmatively the question "whether it is a violation of the Sherman Anti-Trust Act for labor unions and their members, prompted by a desire to get and hold jobs for themselves at good wages and under high working standards, to combine with employers and with manufacturers of goods to restrain competition in, and to monopolize the marketing of, such goods". Cross-petitioners rely heavily on the rationale of this case.

(4) The landmark case intervening between *Allen-Bradley* and *Pennington*<sup>7</sup> is the *Los Angeles Meat Drivers*<sup>8</sup> case. So far as its actual ruling was concerned, it is a precedent aiding cross-petitioners. But petitioners have made industrious and paralogistic use of the concluding *dictum* in that case. Petitioners give such literal and paramount scope to that *dictum's* "job and wage competition and other economic interrelationship" formula, as would make every decision of management subject to mandatory collective bargaining! Such inordinate expansion of labor-union interest is manifestly unreasonable and opposed to Congressional intent.

<sup>7</sup> 381 U. S. 657 (1965).

<sup>8</sup> 371 U. S. 94 (1962).

In *Fibreboard Paper Products Corp. v. NLRB*, 379 U. S. 203 (1964), Mr. Justice Stewart had occasion (in his concurring opinion) to inveigh against such unreasonableness:

“\* \* \* Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and of sales, all may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve 'conditions of employment' that they must be negotiated with the employees' bargaining representative.

“\* \* \* An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of Section 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from the area.

\* \* \*

“This kind of subcontracting falls short of such larger entrepreneurial questions as what shall be produced, how capital shall be invested in fixed assets, or what the basic scope of the enterprise shall be. In my view, the Court's decision in this case has nothing to do with whether any aspects of those larger issues could under any circumstances be considered subjects



of compulsory collective bargaining under the present law."<sup>9</sup>

(5) Next came the important *Pennington*<sup>10</sup> and *Jewel Tea*<sup>11</sup> antitrust opinions of this Court. The following quotation from the text of an address delivered by Professor Milton Handler of Columbia University Law School at the AFL-CIO Industrial Department Lawyers Conference (November 19, 1965) accurately summarizes the rules of those cases:

"Taken together, the opinions of Mr. Justice White, who wrote for a majority of the Court in *Pennington* and for two of his brethren in *Jewel Tea*, add up to this: a union is exempt from the operation of the antitrust laws only if its conduct satisfies two standards. First, it must act 'unilaterally' in the pursuit of its own self-interest, rather than 'at the behest of or in combination with non-labor groups'. Second,

---

<sup>9</sup> Apparently Mr. Justice Stewart found it necessary to disclaim the idea that the duty to bargain extended to such matters as advertising, product design, financing, etc., because of the Solicitor General's brief in the *Town and Country* case, wherein can be found the following strange statement: "It may be objected that the literal reading would give labor unions a statutory right to bargain about a host of subjects heretofore regarded as 'management prerogative', including prices, types of product, volume of production and even methods of financing. Such is doubtless the logical, theoretical consequence of giving effect to the literal sweep of words, although the Board has never gone so far."

Mr. Cox here did not say that the Board *may not legally* go so far. He simply states that the Board *has not yet* gone so far. That is why the statement quoted from Mr. Cox's brief is eyebrow-raising.

One could draw similar "logical, theoretical" conclusions from the *dictum* in the last paragraph of the *Los Angeles Meat Drivers* case by giving "effect to the literal sweep of words" included in that terminal *dictum*. Mr. Justice Stewart's cautions and comments are relevant.

<sup>10</sup> *United Mine Workers v. Pennington*, 381 U. S. 657 (1965).

<sup>11</sup> *Local Union No. 189 v. Jewel Tea Co.*, 381 U. S. 676 (1965).

even if the union's activities are 'unilateral' in this sense, in order to be protected they must concern a subject 'intimately' related to matters of 'immediate and direct' union concern—wages, hours and working conditions—rather than to matters, such as prices, which have only indirect concern to the union. (Labor Relations Yearbook, 1965, Bureau of National Affairs, p. M9 at p. 122)."

Under each of the two tests or standards carefully and correctly culled from *Pennington* and *Jewel Tea* by Professor Handler, the petitioning unions here violated the Sherman Act. First, they did not act "unilaterally", in the sense defined by Professor Handler. They acted *in combination with non-labor groups* within the meaning of Mr. Justice White's language (281 U. S. at 690 and 281 U. S. 664-665). Second, the petitioning unions fixed minimum *prices* for musical services, a subject which was not "intimately related" to matters of "immediate and direct" union concern.

Even Mr. Justice Goldberg's opinion (on behalf of himself and Justices Harlan and Stewart) does not help petitioning unions. For Mr. Justice Goldberg, the scope of labor's immunity is coextensive with the duty of labor and management to bargain about wages, hours and working conditions. Petitioning unions never bargained with orchestra leader-employers; although one would scarcely understand this from the zealous manner in which, in their petition, they take up cudgels to defend collective bargaining. Mr. Justice Goldberg declined to concur in Mr. Justice White's opinion in *Jewel Tea* only because he understood the latter as rejecting the view that *all* agreements, "resulting from union-employer negotiations" on compulsory subjects of bargaining, are automatically exempt.

Mr. Justice White simply applied the *Allen-Bradley* rule when he said that there was no exemption for a union which joined an employer conspiracy or combination "to elim-

inate competitors from the industry" (381 U. S. at 665-666). Regardless of the involved antitrust violation, Mr. Justice Goldberg, on the contrary, indiscriminately gives automatic blanket exemption to agreements on mandatory subjects of bargaining and on matters intertwined with mandatory subjects of bargaining (381 U. S. at 714). *Taken on its facts, Allen-Bradley involved a union which organized the involved conspiracy or combination with employers.* In principle and in reason, the rule should be the same whether *employers take the initiative in fixing prices* in order to gain protection from a labor contract or whether *a union takes the initiative in fixing prices* (and in suppressing competition) to gain protection from a labor contract. The antitrust laws are equally violated in each case.

But *Pennington* goes beyond *Allen-Bradley* in stating that "from the viewpoint of antitrust policy . . . all . . . agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a . . . basic defect, without regard to predatory intention or effect in the particular case" (381 U. S. at 668). The Local 802 labor contracts with hotels, night clubs and restaurants suffer from this "basic defect".

## CONCLUSION

**The petition should be denied and the cross-petition granted.**

Dated: New York, N. Y., August 23, 1967.

Respectfully submitted,

GODFREY P. SCHMIDT,  
Attorney for Cross-Petitioners,  
100 West 42nd Street,  
New York, N. Y. 10036.

ANTHONY J. SHOVELSKI,  
Of Counsel.

Tel. 212-279-0355



LIBRARY  
SUPREME COURT U.S.

FILED

JUN 29 1967

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**

October Term 1966.

No. **310**

JOSEPH CARROLL, CHARLES PETERSON and  
CHARLES TURECAMO, as Treasurer, Orchestra  
Leaders of Greater New York,  
*Plaintiffs-Respondents,*  
*against*

AMERICAN FEDERATION OF MUSICIANS OF THE  
UNITED STATES AND CANADA, etc., *et al.*,  
*Defendants-Petitioners.*

**Cross-Petition for a Writ of Certiorari to the United  
States Court of Appeals for the Second Circuit.**

GODFREY P. SCHMIDT,  
*Attorney for Plaintiffs-Respondents,*  
100 West 42nd Street,  
New York, N. Y. 10036

ANTHONY J. SHOVELSKI,  
*Of Counsel.*





## Table of Contents.

	Page
Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit .....	1
Opinions Below .....	1
Jurisdiction .....	1
Questions Presented .....	2
Statutes Involved .....	7
Statement .....	8
Union Conduct Depicted by Court of Appeals .....	8
Additional Union Practices .....	11
Reasons for Granting the Writ .....	18
Conclusion .....	36
APPENDIX A .....	37
APPENDIX B .....	37
APPENDIX C .....	38

## TABLE OF CASES.

Allen-Bradley Co. v. Local No. 3, 325 U. S. 797, 809 (1945) .....	18, 19, 21, 30, 33
Carroll v. AFM, 372 F. 2d 155, 158 (1967) .....	1, 8
Columbia River Packers Ass'n v. Hinton, 315 U. S. 143, 147 (1942) .....	19

Hunt v. Crumboch, 325 U. S. 821 (1944) .....	4, 25, 26
Local No. 189, Amalgamated Meat Cutters, v. Jewel Tea Company, 381 U. S. 676, 689-90 (1965) .....	19
Los Angeles Meat & Provision Drivers' Union v. United States, 371 U. S. 94, 102 (1962) .....	20, 30
Teamsters v. Hanke, 339 U. S. 470 (1950) .....	19
United Mine Workers v. Pennington, 381 U. S. 657, 665 (1965) .....	19, 30
United States v. Hutcheson, 312 U. S. 219 (1941) .....	21
Vaca v. Sipes, 87 S. Ct. 903 (1967) .....	22

OTHER AUTHORITIES.

28 U. S. C. §1254(1) .....	1
Accommodation of the Norris-LaGuardia Act to Other Federal Statutes, 72 Harv. L. Rev. 354 (1958) .....	22
Meltzer, Labor Unions, Collective Bargaining and the Antitrust Laws, page 682 .....	20
Norris-LaGuardia Act (47 Stat. 90, 29 U. S. C. §101) .....	7, 21, 26
Sherman Anti-Trust Act (28 Stat. 209, 15 U. S. C. §1) .....	7, 26
Taft-Hartley Act, §302 .....	10

IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1966.

---

JOSEPH CARROLL, CHARLES PETERSON and CHARLES TURE-  
CAMO, as Treasurer, Orchestra Leaders of Greater New  
York,

*Plaintiffs-Respondents,*

*against*

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES  
AND CANADA, etc., *et al.*,

*Defendants-Petitioners.*

---

**Cross-Petition for a Writ of Certiorari to the United  
States Court of Appeals for the Second Circuit.**

Plaintiffs-respondents pray that a writ of certiorari  
issue to review the judgment of the United States Court  
of Appeals for the Second Circuit dated January 30, 1967.  
They do not, of course, find fault with said Court's con-  
demnation of Union price-fixing.

**Opinions Below.**

The opinion of the District Court is reported in 241  
F. Supp. 865 (S. D. N. Y. 1965). The opinion of the  
Court of Appeals for the Second Circuit is reported in  
372 F. 2d 155 (1967).

**Jurisdiction.**

The judgment of the United States Court of Appeals  
for the Second Circuit was entered January 30, 1967.  
The jurisdiction of this Court is invoked under 28 U. S. C.

## Questions Presented.

1. Whether defendant-Unions violated Federal anti-trust laws by combining with *non-labor groups* (many classes of *employers, e. g.,* orchestra-leader-employers who comply with defendants' regulations, hotels, nightclubs, restaurants, caterers, booking agents, theatre owners, dance-hall operators, recording companies, radio stations, TV stations)<sup>1</sup> for the purpose or with the effect of (i) fixing prices, (ii) eliminating or suppressing competition and restraining trade, (iii) imposing unreasonable restraints on interstate commerce, and (iv) engaging in monopolistic practices in the field of musical entertainment in the United States?

2. Whether said Unions' "representation of orchestra leaders, whom \* \* \* [the Court of Appeals] \* \* \* has held to be employers in the field under consideration,"<sup>2</sup> justifies said Unions' unilateral imposition of: (i) AFM booking agents' licensing system; (ii) Union employment quotas; (iii) Union restrictions on interstate commerce; (iv) Union suppression of competition; and (v) other Union monopolistic practices, such as the AFM "arbitration; system (AFM bylaws Article 9); all enforced in combination with *non-labor groups*?

3. Whether, under the *Allen-Bradley* doctrine,\* Union contracts and bylaws constitute forms of *combination* (to effect commercial restraints upon plaintiffs) between Unions and *non-labor groups* in these cases?

4. For the purpose of applying the *Allen-Bradley* doctrine is it significant that the commercial restraints *were initially instituted by Unions*, though immediately thereafter (i) acquiesced in by many orchestra-leader-em-

<sup>1</sup> Hereinafter the words, "*non-labor groups*," refers to the categories named in this parenthesis.

<sup>2</sup> Decision below: 372 F. 2d 155, at 165.

\* *Allen-Bradley Co. v. Local No. 3*, 325 U. S. 797 (1945).



ployers and other *non-labor groups*; and (ii) enforced by combinations between Unions and *non-labor groups*?

5.<sup>2</sup> For the purpose of applying the *Allen-Bradley* doctrine, may employers like plaintiffs be placed in a "labor group"?

6. Whether the fact that many orchestra leaders (other than plaintiffs) are variously involved in the musical industry (*cf.* the "spectrum"<sup>3</sup> described by dissenting Judge Friendly) limits the rights of plaintiffs (under antitrust laws) who are professional leaders and who do not work as employee musicians?

7. Whether certain unilateral Union practices, enforced or maintained in combination with *non-labor groups*, (e. g., fixing closed shops, wage scales, minimum employment quotas, working conditions and coercion of union membership on employers) may be regarded as antitrust law violations without first obtaining an NLRB decision that they are unfair labor practices under the NLRA (p. 167)?

8. Whether the principle that "a closed shop dispute—concerns a 'term or condition of employment'" (p. 167) has relevance here to exempt Unions from liability under the Sherman Act, where there is no bargaining and where the closed shop, enforced by Unions in combination with *non-labor groups*, manifestly violates the national policy declared by the NLRA and therefore constitutes a predatory practice?

9. Whether the rule "that a music purchaser \* \* \* cannot refuse to bargain on a union's demand that only musician-employees who belong to the local union be

<sup>3</sup> 372 F. 2d 155 at 168 and 169. Judge Friendly also relied on the *sui generis* character of employment—an employment which is often sporadic, such as one encounters in such industries as construction, entertainment, house-painting, restaurant, catering, etc. (Hereinafter references like "(p. 167)" refer to pages of the Court of Appeals decision cited, in this footnote.)

employed" (p. 167) has any relevance to exempt Unions here from antitrust law liability where (i) admittedly there is no bargaining with music purchasers; and (ii) the Unions enforce prices, wages and working conditions in combination with *non-labor groups*?

10. Whether the fact that travel restrictions and employment quotas are usually mandatory subjects of bargaining is relevant here (as the Court below held), despite the undisputed fact that defendant Unions systematically refuse to bargain or deal with plaintiffs and other leader-employers (pp. 165-166)?

11. Whether the fact that "the national policy demands that the parties [to collective bargaining] be permitted freely to reach agreement on terms and conditions directly affecting the working man" (p. 164) has application here to exempt Unions from antitrust law violations, since Unions systematically refuse to bargain with orchestra leaders as employers?

12. In view of the *combination* between defendants-petitioners and businessmen, is defendant Unions' refusal to deal with plaintiffs as employers of sidemen, whom Unions purport to represent, an infringement of the Sherman Act, whether such refusal is or is not, according to NLRB categories, an unfair labor practice (p. 165)?

13. Whether *Hunt v. Crumboch*, 325 U. S. 821 (1944), which antedated the Taft-Hartley Act (1947), is any longer a valid precedent (as the Court of Appeals held), since that Act establishes the principle that a labor union (even in the absence of a *conspiracy* or *combination* with businessmen) which purports to represent an employer's employees, must deal with such employer (p. 167)?

14. Whether, as the Court below held, the involved "exertion of pressure on orchestra leaders to join the Union reflects a legitimate union concern for the closed shop" (p. 168)?

15. Since, as the Court of Appeals stated, application of the Sherman Act "involves a balancing of conflicting Congressional policies," can the Norris-LaGuardia Act be said to take *all* "labor disputes" outside the reach of the Sherman Act, thus indiscriminately providing unions with a blanket exemption, or only *some* disputes, *i. e.*, those where the union (unlike the Unions here involved) does not *combine* with *non-labor groups* to fix prices, suppress competition and to impose other commercial restraints?

16. Whether the defendant Unions' travel restrictions and peculiar (since they include *employers*) *employment quotas*, enforced in combination with *non-labor groups*, are immune from attack under the Norris-LaGuardia Act?

17. Whether the *purpose* of such *combination* must be "to create a local business monopoly" or whether the *result* of such a *combination* (between Unions and *non-labor groups*) is sufficient to withdraw the shield of Norris-LaGuardia and to create liability under the Sherman Act?

18. Whether a *conspiracy* must be shown or whether a *combination* (by agreements or otherwise) with *non-labor groups* to fix prices, to suppress competition and to impose other commercial restraints is sufficient to cause a case "to fall outside the protection of the definition of 'labor dispute' in §13 of the Norris-LaGuardia Act"?

19. Whether defendants-petitioners' establishment of employment quotas was not tantamount to price-fixing, since the orchestra-leader-employer himself is reckoned

as one of the persons to be counted in the quotas which defendants-petitioners enforce in combination with non-labor groups?"

20. Whether defendants-petitioners' regimentation of booking agents, licensed by Federation and working in *combination* with the Federation and its Locals, is not another aspect of defendants-petitioners' price-fixing and other monopolistic conduct in combination with *non-labor groups*?

21. Whether defendants-petitioners' bylaw requiring all leader-employers to use the "Form B" contract, unilaterally prepared by the Federation and enforced in combination with *non-labor groups*, violates antitrust laws not only because said contract is a tool for price-fixing but also because it is, itself, an important means for Unions' many monopolistic practices, enforced in combination with *non-labor groups*?

22. Whether defendants-petitioners' unilateral establishment (by bylaws and other mandated practices) of numerous travel restrictions, and their enforcement in *combination* with *non-labor groups*, constitute, cumulatively, unreasonable burdens on interstate commerce?

---

\* The unilateral mandate of minimum employment quotas by defendant Unions necessarily increases defendant-fixed prices; because, under the regulations contained in the Union "minimum booklets," the orchestra leader himself is regarded as one of the musicians to be counted in each minimum quota. Plaintiff Carroll's testimony shows that, in 1950, Local 802 had fixed minimum quotas of employment for less than 20 hotel rooms in New York City. By 1963, Local 802 had unilaterally fixed minimum employment quotas for some 1,700 rooms in hotels, nightclubs and catering establishments in its jurisdiction [715-718]. *E. g.*, the Grand Ballroom of the Waldorf Astoria requires for certain functions a minimum of 12 musicians. When a leader-employer leads his orchestra, he is regarded as one of these twelve. Therefore, the minimum, *leader's compensation* (required by union rules for the orchestra leader's appearance) has to be included in the minimum price charged to the client. The leader-employer may not waive this item of Union-decreed minimum profit for leaders (Plaintiffs' Exhibit 241).

23. Whether the Unions' and Trial Court's bald assertion of plaintiffs' "job competition" with Union sub-leaders, unsupported by any specific record evidence of actual instances of such competition, can make *employers* like plaintiffs "proper subjects for union membership"?

24. Whether as a matter of law leader-*employers* like plaintiffs can fairly be said to be in competition with their own employees?

25. Whether Unions' price-fixing and other monopolistic practices in combination with *non-labor groups* may be excused on the alleged ground that there is "job or wage competition or any other economic relationship" between leader-employers and their employees?

26. Whether orchestra-leader-*employers*, like plaintiffs, should be permitted to be or to remain members of the Unions which represent their employees?

27. Is there a class of orchestra-leader-employers within the meaning of Rule 23 FRCP?

### **Statutes Involved.**

The statutory provisions involved were the Sherman Anti-Trust Act (28 Stat. 209, 15 U. S. C. §1) and the Norris-LaGuardia Act (47 Stat. 90, 29 U. S. C. §101). They are, so far as relevant, reproduced in the Appendix A and Appendix B.



### Statement.

Petitioners-defendants (hereinafter sometimes called "Defendant-Unions" or "Unions") have over a period of many years displayed unparalleled power.<sup>5</sup>

### Union Conduct Depicted by Court of Appeals.

Almost all musicians (leaders, sidemen, subleaders) in the United States are AFM members (*Carroll v. AFM*, 372 F. 2d 155, 158). Local 802 has virtual control over the industry in the New York City area (p. 158).<sup>6</sup> All Union-mandated engagement ("Form B") contracts dub the purchaser of the music as "employer" (p. 158), even when the orchestra leader is the true employer (p. 159). The club date field, which is the largest field in the musical industry (p. 158), is not subjected to collective bargaining, but to Union regulations (p. 159). Considerable hiring

<sup>5</sup> In his book entitled "The Musicians and Petrillo" (Bookman Associates, Inc., New York, 1953), Robert D. Leiter wrote:

"The power of the union is evident not only in the internal affairs of the organization but in the union's relations with employers. The American Federation of Musicians exercises complete control over professional musicians in the United States. A musician who is not in the union normally cannot earn a livelihood by playing an instrument. The union frequently has been able to impose terms of employment upon employers without negotiation. Some employers and some agents have been required to secure licenses from the union before being able to hire or deal with musicians (Preface, p. 7).

"\* \* \* even at the turn of the century the union [A. F. of M.] was manifesting signs of unilateral action in fixing conditions of employment which have reappeared again and again throughout its history. \* \* \* this union has tended to lay down the law to employers without requesting their acquiescence and without consulting them (p. 24).

"Local 802 \* \* \* does not negotiate with all who desire to hire musicians. Instead it sets the price in advance and an employer must pay the scale fixed by the Local or go without musicians. In dealing with the important and organized employers the union does not bargain collectively" (p. 100).

<sup>6</sup> Pages of the Court of Appeals' decision hereinafter take this form: (p. 158); pages of the Stenographer's Minutes of the trial appear simply as numbers in parentheses: (158).

is done through the Union hiring-hall (p. 159). Many engagements are obtained through booking agents (p. 159), licensed and minutely regulated by AFM (p. 159). Union members must use only booking agents so licensed (p. 159). Defendants exercise "rigid and monolithic control over much of the music industry" (p. 159), and everywhere enforce closed shops (p. 160). Orchestra-leader-employers are coerced into the same Unions (p. 160) with their employees. Local 802 makes it a bylaw [Art. IV, §4(h)] violation "To perform in or with a band or orchestra which is led or conducted by a non-member of the union or in which a nonmember plays an instrument or performs any other work of a musician" (p. 160).

One Union weapon to compel conformity with AFM rules, even by non-members, is the "Unfair List" (p. 160). Local 802 "regulates the club date field in great detail" (p. 160). Its "Price Lists" unilaterally (p. 160) fix minimum prices, wage scales and working conditions. Leader-employers, the public, all purchasers of music, must comply (p. 160). Price Lists, decreeing that orchestra leaders are "employees" of the purchaser, are unilateral codifications by Local 802's Executive Board of prices, employment quotas and wage scales. They regiment "with considerable specificity" all details of musical engagements (p. 160); set price floors for clients and leaders and minimum profits for leaders on single and steady engagements (p. 160). They are union by-laws obligating all members (p. 160). Collective bargaining with leader-employers or their clients (concerning the wage scales and other regulations) is *verboden* (p. 160). Enforcement of Union regulations "is achieved by requiring orchestra leaders to report and by insistence upon the use of the Federation's 'Form B' contract" (pp.

---

<sup>7</sup> Thus, in the club date field, which comprises most of the single engagements and in many steady engagements, terms and conditions of employment are determined by unilateral Union action (p. 93; 160).

160-61). That printed Union contract is the only one permitted (p. 160), except that somehow Local 802 "has relaxed these [Federation] rules for single engagements" in some respects (p. 161).<sup>\*</sup> Such contract forms, executed by leader-employer and client, must be "submitted for approval to the Local Union before the performance" (p. 161). Union "business representatives" attend performances to check compliance with Union regulations (p. 161).

Many additional regulations for traveling engagements protect local musicians (including leader-employers) from competition with traveling musicians (p. 161). Up to January 1, 1964, the Unions systematically enforced a "10% traveling surcharge," which since 1947 violated §302 of the Taft-Hartley Act (p. 161). Since 1964, a Union "price differential plan" has been imposed on traveling leaders: a percentage of the "minimum price of either \* \* \* home local or of the local in whose territory it [traveling orchestra] is playing, whichever is greater" (p. 161). A leader-employer who travels outside his Local's jurisdiction to play an engagement is unilaterally barred from accepting any single engagement until his steady engagement is completed; and at the end of an initial steady engagement he is also barred from accepting another steady engagement in the invaded Local's jurisdiction (p. 161).

The "Federation inhibits traveling" across state lines (p. 161). There are unilateral Union restrictions on importations of musicians by a leader (p. 161). Members who transfer from one Local to another are limited by Union rules forbidding competition in the new area for three months (p. 161). These AFM regulations protect Local members (including leader-employers) from competition with other leader-employers when the latter invade the jurisdiction or when they are transferred to

---

<sup>\*</sup> See Appendix C.

another Local (p. 161). Local 802 also forbids acceptance of musical engagements from caterers (168). Booking agents may not deal with or act for non-union musicians or leaders (168).<sup>8</sup>

### Additional Union Practices.

The foregoing, as well as other Union practices, cumulatively build up into extensive monopolistic activity, all *in combination with non-labor groups*.

The 10% traveling surcharge provided AFM with some 63% of all its revenues (Plaintiffs' Exhibit 200, p. 32). Plaintiffs' Exhibit 200 shows that AFM in 1962-63 exacted from traveling *orchestra leaders* \$1,428,538. An equal amount was exacted from the same leader-employers for the treasuries of AFM Locals (Plaintiffs' Exhibit 162, p. 103, §7).<sup>9</sup>

Orchestra leaders are forbidden by AFM bylaws to obtain loans for their own businesses as leaders without permission of the AFM president (Article 25, §23, AFM Bylaws)! Investments in shows by orchestra leaders are Union regulated (289). Booking agents are required (District Court's Findings of Fact Nos. 117-18) to enforce AFM bylaws, including minimum prices. Failure to do so jeopardizes their licenses and their businesses, since AFM retains the power to revoke such licenses without notice and without reason (AFM Bylaws, Article 25).

<sup>8</sup> In spite of its impressive list of commercial restraints imposed by defendant Unions (in combination with non-labor groups), the Court of Appeals and the District Court erroneously regarded plaintiffs' charge of *monopoly* as confined to Unions' *closed shop*!

<sup>9</sup> AFM President Kenin recognized the inequity of this burden on leader-employers; he conceded that "orchestra leaders, our friends, dedicated and faithful members of the Federation and good trade unionists—have been saying for many years that they should not be called upon to bear such a disproportionate weight of the Federation's financial needs \* \* \*."

AFM and *all* its Locals have price lists (17). Federation's price lists were for many years included in its by-laws (Plaintiffs' Exhibit 162). Most leader-employers and bookers combine with defendant Unions to enforce these price lists (8, 89-90, 272, 293, 374, 449, 522-23, 557, 996, 1102, 1133, 1716, 2567-68, 3653, 3655, 3668). But prices are not uniform from Local to Local. This gives rise to many advantages and disadvantages for leader-employers, depending on their Local membership. E. g., consider Emil Paolucci, an orchestra leader-*employer* (728ff) and member of Local 802 in New York City, of Local 38 (of which he is president<sup>10</sup>) in Larchmont and of Local 402 in Yonkers. The minimum prices fixed by Locals 38 and 402 in their "Price Lists" are substantially lower than those required by Local 802 "Price List" (746-50). When Paolucci plays in Local 38's jurisdiction, he is not bound (because of his dual membership) by Local 802's bylaws fixing higher prices. He is permitted to charge his clients the lower minimum prices of Local 38, even though he is a member of Local 802 (which has the highest minimum prices in the industry). But plaintiff Cutler, who is a member of Local 802 (2228) and not a member of Local 38, must charge higher (Local 802's) prices for engagements played by his orchestras in the jurisdiction of Local 38 (2464-74). The same sort of union-regulated price discrimination affects Mr. Cutler when he plays in Yonkers or in New Jersey, where (to select just one of the eleven price ingredients [Plaintiffs' Exhibit 388] legislated by AFM Locals) the minimum New Jersey rate of wages was \$20 for four hours (the applicable minimum time unilaterally prescribed by involved AFM Locals), while the Local 802 rate was \$32, (without adding travel expenses and other price elements

<sup>10</sup> This is a violation of the Labor Law of the State of New York, Article 20A, §721(1)(a); and it is incompatible with the national labor policy prescribed in NLRA.



mandated by Local 802 for leaders who take their orchestras from New York City to Newark). The net result was that Cutler lost many clients in Westchester County, New Jersey and Washington, D. C. (2464-74).

Rates negotiated with recording companies apply to orchestra leaders not privy to the negotiation (58-60). AFM president testified that Article 26, AFM by-laws, pertaining to traveling military, concert and brass bands apply to all members, as do Article 27 relating to fairs and circuses (64-66) and many other articles in AFM bylaws. The TV film contract, originally negotiated with three large companies, must later be signed by everybody else in the business (74). The same is true of the contract negotiated with advertising agencies (79-80). The transcription contract (Defendants' Exhibit BV), negotiated with a few transcription companies, must be signed by all others (81). *All of these rates become the obligations of leader-employers, who were not party to their negotiation.*

Disputes involving traveling bands, which are hampered by many Union rules (146, 163-66, 145, 280-87, 948-49), must be settled by the AFM Executive Board (118-19), and, under Article 9 of its bylaws, AFM has a stake (2569) in the disputes which it "arbitrates" (119-21, 3538). Local 802 prices and rates obligate traveling orchestras which visit New York (145). All contracts for engagements negotiated by leader-employers with their clients must incorporate AFM and Local rules and must be filed with and approved by the Local having jurisdiction (166-67, 214, 656-62, 672-73). AFM issues licenses to companies which desire to make recordings and they may not make them without such licenses (169-70). Under Article 2, §5(P), AFM Bylaws, the International Executive Board has supervision over all prices, but only to raise them (194-96).

The president of Local 802 testified that the labor contracts negotiated by Local 802 with hotels, night clubs and restaurants obligate (3581) orchestra leaders, who never participate in such negotiation (237, 238, 277-78, 892). Local 802 arbitrarily and unilaterally fixes "mileage" fees for members who travel outside its jurisdiction or across state lines. Mileage fees must be included in the price paid by clients (266; Plaintiffs' Exhibit 388; 2549-51). If an orchestra leader takes his orchestra to the West Coast and plays three or four engagements for different purchasers in that area, he must charge *each purchaser* the mandated mileage fee (267-68, 1664-66).

Union delegates have free access to hotels, nightclubs and restaurants to check whether leader-employers (not parties to the involved or any contracts) are charging prices and paying wages prescribed by the hotel-restaurant-nightclub contracts (295). Minimum quotas, fixed unilaterally by Union officials, are always urged upon guests by hotels, nightclubs, restaurants and caterers. Purchasers of music are warned of Union reprisals unless such quotas are honored (457; 464-5; 469-73; 996; 1001; 1601; 2205-6; 2215-6; 2338-40; 2348; 2404-5; 2677-8). Leader-employers, who obtain engagements through bookers, use Federation-licensed booking agents only (130-32) and comply with Union bylaws, including those which fix prices (8; 557; 536-38; 546-51); since most leaders, who earn a living in whole or in part from the musical industry, must belong to AFM (84). There is no competition between orchestra leaders at prices below those fixed by AFM and its locals (89-90; 146; 293; 2510; 3653-55). Practice in the musical industry invariably follows AFM bylaws (151-52). A non-union leader-employer cannot obtain employee musicians (165) and is blacklisted or boycotted. Leader-employers freely admit that they always follow Union regulations respecting prices, closed shops, booking agents, etc. (374; 449; 1102-05; 1362; 2510; 3512

ff.; 3843-45). Hotels, nightclubs and restaurants always collaborate by insisting that patrons observe Union minimums, prices, and closed-shop rules (895; 2086; 2205-08; 2215-16; 2377; 3151-52; 2932). Caterers also combine with defendant Unions by enforcing closed shops, minimums, prices and wage scales (772-78; 2348; 2357; 2404-05; 2677-78). Booking agents comply meticulously with Unions' unilateral regulations pertaining to prices, closed shop, minimums, etc. (996-1001; 522-23; 1102-05; 1133; 2505-06). So do arrangers (204; 1839-40), recording companies (1469; 58-60), "Class C" establishments which are nightclubs, bars, *et al.*, not covered by the hotel contract (689; 1267; 1278-79; 1292; 1692; 3493-97; 3571-74), and TV chains (2314-15; 2779). The City of New York also collaborates with defendant Unions in a similar fashion (1581; 1601).

In the recording, TV and radio industries, usual practice or the applicable "Form B" contract (i) enforces designation of orchestra-leader-employers as "employees" (3655) and (ii) requires the recording company, television company, *et al.* (which are not the employers) to pay wages to the leader-employer's sidemen, deducting from the lump sum (royalties) payable to the leader-employer such wages, withholding taxes, etc. (1533-34; 430-32; 1067; 3596-97; 1089; 1491-92; 1536-42; 2699-2700; 3512; 3551; 1198-1203).

Some orchestra leaders are union officials<sup>11</sup> (927; 728-31; 976-80; 141), having access to the business contracts of their competitors (755-56).

<sup>11</sup> The New York State Labor Law, Article 20-A, Section 723(1) (a), provides: "Without limiting his fiduciary obligation provided in section seven hundred twenty-two, it shall constitute a violation of his fiduciary obligation for an officer or agent of a labor organization: (a) to have, directly or indirectly, any financial interest in any business or transaction of \* \* \* an employer whose employees his labor organization represents \* \* \*".

Leader-employers like plaintiffs do not bid against any of their employees for engagements (1976; 2154; 2510-11; 2522; 2567-68; 2570; 3871). Some leader-employers approve Unions' price-fixing regulations as their protection against competition (1253-54; 3659-60; 274; 1706; 2060; 2472-75; 2593-95). Local 802 has even tried to regulate competition (3728) between two hotels by means of its unilateral minimum employment quotas (3240-45) and between kosher and non-kosher "places" (3620).

Although leader-employers are forced into AFM unions, their interests are different from those of employee members (508; 2498; 3240; 3657; 3659).

A leader-employer is bound by the recording company labor contract; and even though he does not take part in its negotiation (58-62), he is saddled with the expense of employer payroll taxes and contributions (despite the fact that the contract calls him an "employee"). All AFM bylaws which apply non-negotiated or negotiated prices and wages obligate leader-employers (65-70) with whom the Unions do not deal. Non-members on TV would be boycotted (161). No leader's engagement contract will be approved unless he is in good standing (298). Places where music is performed are classified by the Local 802 Executive Board without negotiation (1249); and Union prices, wages, and other conditions automatically attach to the particular classification without negotiation (1258-59), depending on the Local 802 Executive Board's estimate of capacity to pay (1258).

Imposition by Unions of minimum employment quotas has caused much unemployment and many decreases in live-music engagements (1722-23; 1976-78; 2060-66; 2121-24). So have Unions' unilateral wage increases (2589; 2593-95).

AFM Unions suppress competition in numerous ways (2435): Unilaterally they forbid leader-employers to con-

tract for package deals (3246; 3696); they bar caterers from hiring musicians (3248-50); they segregate Negro locals from white locals, each with different price lists (3645); they forbid arrangers from leading orchestras (3284); Local 802 signs a labor contract with a theatre-landlord (Shubert Brothers) to cover the musician employees of *third parties* (3284). Members on steady engagements may not play a single engagement (3318-20); and Unions impose what are in effect *standby musicians* on theatre productions to the point where some employee musicians only come in to collect their pay checks (3366). There are other restraints of trade (3321-23).

All leader-employers who are expelled from membership are published as "erased" by AFM, which encourages its locals to do likewise (3390). Such publication facilitates boycotting.

There are 400-500 "Class C" establishments in Local 802's jurisdiction where the leader-employer signs a "Form B" contract in order to perform. Thus he makes himself liable for terms "negotiated" solely between the local and the owner of the establishment or, more usually, unilaterally imposed by Local 802 officials. (3572-73).

There is a unilaterally imposed wage and price differential for "augmented bands" (3729-31). During recording sessions, orchestra-leader-employers are in control (3857; 1078-1080; 1198-1203) but Unions exaggerate the control of the A & R man for their own purposes.

The Unions have an arsenal of sanctions to enforce their bylaws against members (and in some cases non-members); e. g., fines up to \$5,000; suspensions; expulsions; unfair lists; strikes; boycotts (AFM Bylaws, Plaintiffs' Exhibit 162, *passim*).

Yet, with all this Union regimentation, use of live music decreases each year (3579). Union membership has not increased since 1953 (3270). Staff personnel in TV and



radio decrease each year (2300-02). Engagements are priced out of the market more and more (Plaintiffs' Exhibit 65; 1723; 1840-41; 1953-58A; 1950-51; 1980-2000; 2121; 2238; 2589; 2593; 2695). And the public is asked to pay higher prices dictated by Union bureaucrats who systematically reject the checks implicit in collective bargaining.

### Reasons for Granting the Writ.

1. As the dissenting opinion below points out, the "line between those forms of union activity which are permissible and those that run afoul of the antitrust laws is anything but bright." The instant cases, ranging as they do over many forms of restrictive Union activity in combination with many non-labor groups, provide an apt occasion for examination and better delineation<sup>12</sup> of the "line" in question.

2. The Unions here acted in combination with many businessmen and employers; especially leader-employers who, as Union members, combined with Unions to impose restraints on commercial competition in the musical industry. The Unions aided "non-labor groups to create business monopolies and to control the marketing of . . . services" (*Allen-Bradley Co. v. Local No. 3*, 325 U. S.

<sup>12</sup> The need for an authoritative clarification of the *Allen-Bradley* (*Allen-Bradley Co. v. Local 3*, 325 U. S. 795) rule and for a review of the many conflicting and confusing cases applying it in different circuits is attested by many significant law review articles. Cox, *Accommodation of the Norris-LaGuardia Act to other Federal Statutes*, 72 Harv. L. Rev. 354, 369ff; Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. of Chicago L. Rev. 659; Handler, *Recent Antitrust Developments—1965*, 40 N. Y. U. L. Rev. 823; Winter, Jr., *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 Yale L. Rev. 14; Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 Pa. L. Rev. 252 (1955); Barnes, Goldberg & Muller, *Unions and the Antitrust Laws*, 7 Lab. L. J. 133, 178, 186 (1956); Bernhardt, *The Allen-Bradley Doctrine: An Accommodation of Conflicting Policies*, 110 Pa. L. Rev. 1094 (1962); Comment, *Labor's Antitrust Exemption after Pennington and Jewel Tea*, 66 Col. L. Rev. 742 (1966); Summers, *Labor Law in the Supreme Court: 1964 Term*, 75 Yale L. Rev. 59 (1965).

797, 809). Orchestra-leader-employers who want no competition at prices below those fixed as minima by the Unions welcome and benefit from Union aid (8; 89-90; 272; 293; 374; 449; 522-23; 557; 996; 1102; 1133; 1716; 2567-68; 3653; 3655; 3668). Defendant Unions thus " \* \* \* participated with a combination of businessmen [orchestra-leader-employers united in the Unions] who [because of the Unions' suppression of competition at prices below those fixed by Unions] had a complete power to eliminate all competition among themselves and to prevent competition from others \* \* \*" (*Allen-Bradley* at p. 809). The Unions did not act "alone" but "in combination with business groups" (*ibid.*, p. 810), i. e., with the groups of leader-employers who belonged to Unions and obeyed their price lists. "A business monopoly [by and for leader-employers protected from competition by the Unions' price floors] is no less such because a union participates [by fixing such price floors and by enforcing the rule of 'No competition below Union prices'] and such participation is in violation of the Act" (*ibid.*, p. 811). A union forfeits its exemption from the antitrust laws "when it is clearly shown that it has agreed with one set of employers [e. g., owners of hotels, nightclubs and restaurants] to impose a certain wage scale on other bargaining units" (*United Mine Workers v. Pennington*, 381 U. S. 657, 665); e. g., plaintiffs' and other leader-employers' employees (237-38; 277-78; 892; 3581). The policy of the antitrust laws is "clearly set" against such employer-union agreements seeking to prescribe labor standards outside the bargaining unit (*ibid.*, 381 U. S. at 672). All this Union activity was "at the behest of or in combination with non-labor groups" (*Local No. 189, Amalgamated Meat Cutters v. Jewel Tea Company*, 381 U. S. 676, 689-90). It is therefore not exempt under the Sherman Act. See also: *Columbia River Packers Ass'n v. Hinton*, 315 U. S. 143, 147 (1942); *Teamsters v. Hanke*, 339 U. S. 470 (1950);

*Los Angeles Meat & Provision Drivers' Union v. United States*, 371 U. S. 94, 102 (1962).

3. There is an equally recognized need for a more practical and principled explication of the diffuse *dictum* at the end of the majority decision in *Los Angeles Meat Drivers Union v. U. S.*, 371 U. S. 94 (1962); since Unions' reliance upon that *dictum* in its *literal* scope is a vehicle for unconscionably expanding (i) the area of unilateral union action *vis-a-vis* employers and (ii) the already distended scope of union exemption from liability under antitrust laws. Meltzer (*Labor Unions, Collective Bargaining and the Antitrust Laws*, *supra*, at pp. 682 ff.), has an interesting footnote<sup>13</sup> on the *dictum*.

<sup>13</sup> \*\*\* The Court's supporting citations, introduced with a 'Cf.', were: *Milk Wagon Drivers' Union v. Lake Valley Farm Prods., Inc.*, 311 U. S. 91 (1940); *Bakery & Pastry Drivers v. Wohl*, 315 U. S. 769 (1942); *Local 24, Teamsters Union v. Oliver*, 358 U. S. 283 (1959). The cited cases, although they illustrate the conflict between the interests of unionized employees and those of businessmen-workers performing similar economic functions, are somewhat remote. Thus, it should be noted that the Court in *Lake Valley* intimated that the 'vendors' were functionally 'employees' and noted that they had been so characterized by the plaintiffs. See 311 U. S. at 95, 98. Furthermore, later developments raise questions about the vitality of *Lake Valley*, which was limited by *Hinton v. Columbia River Packers Ass'n*, 117 F. 2d 310, 313 (9th Cir. 1941), *rev'd* 315 U. S. 143, 147 (1942). The Taft-Hartley amendments to the NLRA were designed to limit the situations in which ostensible independent-contractor relationships were characterized as employment relationships. See §2(3) of National Labor Relations Act, 61 Stat. 137 (1947), 29 U. S. C. §152(3) (1958), amending 49 Stat. 450 (1935); House Comm. on Education and Labor, *Labor-Management Relations Act, 1947*, H. R. Rep. 245, 80th Cong., 1st Sess. 18 (1947); *NLRB v. Steinberg*, 182 F. 2d 850 (5th Cir. 1950). Section 8(b)(4)(A), added by 61 Stat. 140 (1947), 29 U. S. C. §158(b)(4)(A) (1958), as amended, 29 U. S. C. §158(b)(4)(A) (Supp. V, 1963), reinforces §2(3) by proscribing union pressures designed to force self-employed persons to join unions. Even if courts in Sherman Act cases were bound to validate concerted activities of businessmen-workers protected by the NLRA, as amended, there would be no warrant in Sherman Act cases for expansion of the protection accorded by the NLRA. It is true that in the *Oliver* case the Court, without passing on the independent-contractor question, invalidated the application of a state antitrust law to minimum rental rates fixed by a collective bargaining agreement. But the Court carefully noted the absence of any claim that federal law had been violated and made it clear that the bargaining process was to be limited by federal standards. See 358 U. S. at 286. Finally, the position in *Lake Valley Farm* that the Norris-LaGuardia Act barred an injunction against Sherman Act violations growing out of labor disputes (311 U. S. at 102-03) was repudiated in *Allen Bradley*. Plainly, the Court's 'Cf.' carried quite a burden."

4. Despite its wholesome condemnation of Union price-fixing, the ruling below is too tolerant of (i) systematic Union dictatorship over an entire industry wherein subservient non-labor groups are Union vassals; (ii) an unparalleled, unreasonable and unjust aggrandizement of Union power, exercised in combination with non-labor groups; (iii) calculated, extensive and flagrant violations of Federal statutes which provide standards for appraisal of Union conduct toward plaintiffs (and all leader-employers, whether Union members or not); and (iv) artificial defenses and legalistic technicalities deployed by defendant Unions without any consideration of logical or legal consistency. Such tolerance can only aggravate the very problems which this Court tried to solve in *Allen-Bradley*.

5. This Court has several times referred to the crucial distinction between "labor groups" and "non-labor groups." See *United States v. Hutcheson*, 312 U.S. 219 (1941); *Allen-Bradley Co. v. Local 3*, 325 U.S. 797 (1945) and many later cases. However, this Court has never carefully defined these critically important categories. The opinions below demonstrate the need for such definition, which is intimately linked with the aforesaid need for clarification of the *Allen-Bradley* doctrine.

6. The Court below, while verbally applying the doctrine of "accommodation," did not in reality do so. It failed to take into consideration the total vector thrust of the Unions' numerous commercial restraints. The extensive and grave antitrust law violations in which defendant Unions engaged for many years should not be excused either by individual extenuation of each violation, as if the others did not exist, nor by an alleged "accommodation" of different statutes which in effect gives unjust or unreasonable primacy to the NLRA or to the Norris-LaGuardia Act, almost without considera-



tion of the competing claims of such statutes as the Taft-Hartley Act, the Landrum Griffin Act and the Sherman Act. The problem of accommodation is, as Professor Cox put it, "that of preserving the freedom of unions from impingement upon their normal activities by the antitrust laws while at the same time preventing those restraints of trade which are so unrelated to normal union functions and so extensive in their effect on market competition as to be unlawful if done by employers" (*Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 72 Harv. L. Rev. 354, 369 [1958]). Here, defendant Unions' activities of which plaintiffs complained, are not *normal* union activities.<sup>14</sup> Also, the Union activities are "extensive in their effect"<sup>15</sup> on market competition," and are "unrelated to normal union functions."

7. The exclusive jurisdiction of the NLRB over "unfair labor practices," as technically defined by the courts and the NLRB or as read from that Act while running, should not, for the purposes of the Sherman Act, exculpate Union conduct which, whatever its formal susceptibility to strict characterization as an "unfair labor practice," is lawless, predatory practice. It victimizes the public, employers and employees by commercial restraints and exhibits monopolistic inspiration and efficacy, especially because it is always accompanied by Union combination with non-labor groups. This Court recently wrote in *Vaca v. Sipes* (87 S. Ct. 903, 914-15) " \* \* \* We may assume for present purposes that such a breach of duty by the union is an unfair labor practice \* \* \*. The employees' suit against the employer, however, re-

<sup>14</sup> E. g., Unions' systematic refusal to deal with employers; their unilateral imposition of prices, wages, working conditions; their coercion of employers into AFM membership; their exactions from employers of local taxes and traveling surcharges; their enrollment of employers as well as employees, etc., are no part of normal union performance.

<sup>15</sup> E. g., the Unions' price-fixing, travel regulations, employment quotas, licensing of booking agents, etc., have an extensive effect on market competition.



mains a §301 suit, and the jurisdiction of the Courts is no more destroyed by the fact that the employee, as part and parcel of his §301 action, finds it necessary to prove an unfair labor practice by a union, than it is by the fact that the suit may involve an unfair labor practice by the employer himself." In antitrust lawsuits like the instant cases, plaintiffs should similarly be able to prove as Sherman Act violations what in other connections are or may be "unfair labor practices" because, in the total picture, they exhibit use of monopolistic power or constitute commercial restraints imposed by Unions in combination with non-labor groups; *e.g.*, closed shops, refusals to bargain as systematic Union policy and practice, coercion of employers into the same unions which organized said employers' employees. There is nothing to prevent the same acts from being both unfair labor practices under the NLRA and patterns of activity which in their context with other conduct are violative of antitrust laws; just as the same human act can be a crime and a tort under disparate legal definitions.

8. The record shows unmitigated commercial restraints and tyranny over the largest group of employers in the musical industry (i. e., orchestra-leader-employers), facilitated by Union combination with non-labor groups. That tyranny is constituted and maintained by the individual and cumulative causality or effect of the following items of long-standing Union conduct *in combination with non-labor groups*: (1) coercion of employers like plaintiffs into Union membership; (2) coercion of all employers in the industry to agree upon or to put into practice closed shops for all musician-employees; (3) imposition of minimum *price* regulations upon most employers in the industry; (4) dictation of forms of engagement contracts to be signed by leader-employers (including plaintiffs) and purchasers of music (the pub-

lic); (5) imposition on leader-employers of Union-established minimum-quota rules, whose terms are never the subject of any bargaining with anyone, since they are unilaterally originated by Union officers; (6) inclusion of leader-employer himself in the number allotted to each such employment quota; (7) grave curtailment of the right of employers like plaintiffs to travel across state lines for new business; (8) prohibition of competition with other leader-employers by numerous bylaws; (9) systematic refusal to bargain collectively with orchestra-leader-employers because such employers are Union members, subject to unilateral regulation by Union bylaws; (10) unilateral establishment of wages, hours and working conditions for most of the employers in the industry (including all leader-employers) without any dealing with them; (11) in some areas of the industry, Union requirements that customers of leader-employers pay wages owing to orchestra leaders' employees directly to the Local, which in turn pays the leaders' employees; (12) Union ban on lowering orchestra leaders' prices to the public, even when they fully pay the unilaterally fixed Union wage scales; (13) a total monopoly over the industry such as the Court of Appeals decision partially sketches; (14) the past imposition of unlawful exactions ("traveling surcharges" and "local taxes") upon orchestra leaders only; (15) unreasonable burdens on leaders of traveling orchestras; since such leaders constitute less than 5% of Union membership, but they were saddled with the duty of supplying *out of their own pockets* more than 60% of AFM revenues and also a substantial percentage of the revenues of Locals in whose jurisdictions said leaders traveled; (16) threats of strikes, boycotts, unfair lists and fines up to \$5,000, to say nothing of expulsions, which mean for all practical purposes the end of a leader's musical career.

Few, if any, unions have ever before ventured, in combination with so many non-labor groups, upon such a thorough and extensive program of statutory violation, industry-wide commercial restraints and Union-official dictatorship over employer and employee members. As a matter of fundamental justice, defendant Unions should not, even under a most reasonably favorable view of their exemption from antitrust law liability, be permitted to dragoon an entire industry unilaterally and to make *ex parte* impositions upon most employers in that industry. Nor should Union officers be allowed such comprehensive power (as here exhibited)—unilaterally, without due process and without respect for elementary civil liberties—to terminate an orchestra-leader-employer's career.

9. The Court of Appeals' conclusions from *Hunt v. Crumboch*, 325 U. S. 829, neglect the fact that this 1945 case was largely negated by the Taft-Hartley Act (1947) and the Landrum Griffin Act (1959). In 1945, the *Hunt* case supported the proposition that a "labor union's refusal to deal \* \* \* [was] \* \* \* exempt in the absence of a conspiracy with businessmen" because no statutory duty was then placed on unions to deal with employers. But that proposition surely lost validity when Congress enacted laws which forbid a "union's refusal to deal" with the very employer whose employees such unions purport to represent. Furthermore, a *combination* (as distinct from a *conspiracy*), such as exemplified in these cases, suffices for Sherman Act purposes. Nor is it true that "the purpose behind the union's action makes it apparent that there is no violation involved," as the Court of Appeals, relying on the *Hunt* case, held: The purpose of the Unions in all these practices was manifestly lawless and predatory. In any event, the cumulative *effect*, if not *purpose*, behind the Unions' con-

duct is clearly the elimination of non-union competitors (orchestra-leader-employers). A purpose or effect to achieve "uniformity of labor standards" in combination with non-labor groups does not excuse the Union conduct here challenged, especially when one considers the manner in which employers' rights and freedoms are unlawfully confiscated by defendant Unions in their ruthless reach for "uniformity." Such unlawfully coerced uniformity, at the price of such Union restraints upon the industry and the public, is purchased at too high a price. It would seem that the time has come to reverse or substantially qualify *Hunt v. Crumboch*, by considering the contrary pull of the duty to bargain, the duty to avoid closed shops, etc., placed on unions by 1947 and 1959 legislation, considered as interlacing with the Sherman Act, the Norris-LaGuardia Act and the NLRA. In *Hunt v. Crumboch*, 325 U. S. 821 (1945), the union's refusal to admit the employers' employees to union membership resulted in collapse of the employer's business. It was then held this did not constitute a violation of the antitrust laws. By contrast, in the instant cases, the Unions accept or coerce both employees and employers into membership and then purport to represent both. Local 802 acts as spokesman for plaintiffs' employees. At the same time it refuses to bargain with plaintiffs as employers precisely because plaintiffs are (coerced) members of AFM. Thus, the situation of the *Hunt* case is vastly different from that of the instant cases.

10. The argument made by defendant Unions is that there is "competition" (unproved in the record, but merely alleged there in general, conclusory language by Union officers) between orchestra-leader-employers and their subleaders and sidemen. The Union theory of "competition" between employers and their employees would mean that, throughout the entire structure of

American industry, practically all employers are in "competition" with their own employees. An employer or executive can scarcely be imagined who does not from time to time perform work which could be performed by employees. Top executives of the largest American corporations often do the very type of work which some employees can and do perform. Is it therefore to be concluded that top executives are in "competition" with their subordinates and their employees? Or that employers are in the "labor group?" No *specific* examples of such "competition" appear in the record.

It is no more true that, when a professional orchestra leader personally conducts his own orchestra, he displaces the services of a subleader, than it is true that an employer in the advertising industry displaces the services of one of his employees by writing copy which the employee is capable of writing.<sup>16</sup> On the contrary, the orchestra leader, who personally conducts his orchestra, far from displacing employees, actually makes their employment possible. Only by personally leading his orchestra is the leader-employer able to make for himself the type of reputation or demand which is the necessary precondition to his status as employer. The prestige of a band derives from the fact that it is the *employer-leader's* (Guy Lombardo's or Ben Cutler's or Joe Carroll's or Lester Lanin's) band; and that prestige, in most cases, depends on the leader-employer's occasional playing of some instrument.

Also, Unions neglect the record facts that (i) many times (especially when the number of musicians in an orchestra is eight or more), the leader-employer does

<sup>16</sup> The same can be said, *mutatis mutandis*, of many industries or professions: jewelers, architects, druggists, motion picture cartoonists, chemists, photographers, lawyers, doctors, store-keepers, manufacturers, painters, engineers, *et al.*



*not* use a musical instrument, but confines himself to his baton; (ii) an orchestra leader rarely if ever plays an instrument continuously while conducting his orchestra; and (iii) many leader-employers (like Peterson) never play an instrument, preferring to conduct only. Unions, for the convenience of their arguments in this connection, want orchestra leaders to deny or repudiate the very activity which brought them to positions as employer-leaders and which made them suppliers of jobs. Leaders conduct their orchestras by playing instruments in the peculiar way of leaders, a way which is not always instrumental virtuosity.

For two persons to be in competition, it is necessary for them to be in the same market or at least in the same market area. Orchestra leaders such as plaintiffs are not in the same market with their employees nor indeed with any sidemen or subleaders. Not one piece of record evidence puts them there. Defendants contented themselves with purely general statements to the effect that sometimes subleaders or sidemen played as orchestra leaders. (Of course, in doing this, they ceased being sidemen or subleaders and became leaders.) This is utterly inadequate to establish a relation of genuine competition. There was no evidence whatever to indicate that they were operating in the same market with identified employee-musicians-turned-employers.

No sideman or subleader *as such* competes with an orchestra-leader-employer. He must first become an orchestra leader to compete with orchestra-leader-employers. One may just as reasonably say that a jeweler working for Tiffany is in competition with the latter; or that a clerk in the A & P is in competition with Huntington Hartford; or a cub reporter is in competition with his publisher-editor.

A leader-employer, *qua employer*, cannot possibly compete<sup>17</sup> with his own employees for jobs or wages which he provides for them. Nor can he, *qua employer*, compete with his own employees for jobs and wages which they get from other orchestra-leader-employers, when they are not working for him. Insofar as some orchestra leaders seek employment as sidemen or as subleader from some other leader-employers, they do so as potential *employee-musicians* and not *qua employers*. Such employment of leader-employers-turned-employee-musicians is non-existent for plaintiffs Cutler, Carroll, Peterson, and many other orchestra leaders. Such a leader-turned-employee competes with sidemen or subleaders not *as an employer* but as an actual or potential employee-musician. Likewise when the sideman turns leader and looks for engagements *as leader*, he is not competing with orchestra-leader-employers *qua sideman* but *qua leader*. Thus, it is impossible for an orchestra-leader-employer, as such, to compete with his sideman

<sup>17</sup> So loose was the Trial Court's use of the word "competition" that it can stand for many different things, not one of which is analysed or specifically asserted. It is never tied down to any of the eight possible objectives of competition covered by the District Court's equivocal formula:

(1) Competition in general between leader-employer and his own employees or other sidemen for musical engagements, where each strives as a general practice to be *the contracting party* with the same purchaser of the music.

(2) Competition between a leader-employer and an employee-musician for a *specific single or steady engagement*.

(3) Competition, in general, between leader-employers and employee-musicians for *status as orchestra leaders*.

(4) Competition between leader-employer and employee-musicians for *status as orchestra leader in respect of specific musical engagements*.

(5) Competition, in general, between leader-employers and employee-musicians, for *jobs as sidemen or subleaders*.

(6) Competition between leader-employer and employee-musicians for *jobs as sideman or subleader in a specific orchestra to perform a specific musical engagement*.

(7) Competition between leader-employers and employee-musicians for *the wages of sideman or subleader*.

(8) Competition between orchestra leaders and employee-musicians for *the wages of orchestra leaders in the relatively few cases where the latter are employees*.

There is no specific evidence in the record which supports any of the "competitions" identified above.

for jobs; since his musicians as *sidemen* never look for engagement contracts with purchasers of music. Similarly an employer, as such, cannot possibly compete with his own employees for jobs. Nor can he as an employer compete with any employee for jobs. He can only compete with employees for jobs by himself first seeking to become an employee; thus deserting his status as an employer. Sidemen are not substitutable for professional orchestra leaders.

The dictum about "economic relationship of any kind" from this Court's decision in the *Los Angeles Meat Drivers* case was based on an unrealistic stipulation of fact that there was no "job" or wage competition or economic relationship of any kind between the grease peddlers and other members of the appellant union." That dictum, in its full literal scope, is not supported by the holding of any case.<sup>18</sup> Moreover that dictum, taken literally, is necessarily as vague as the word, "relationship" or "relation." The dictum proves too much and too little: too much because it would spell the end of the *Allen-Bradley* doctrine, recently reaffirmed by *Pennington*; too little because we have no bench marks to measure a reasonable ambit for the indefinable key word: "relationship."

<sup>18</sup> "Labor Unions and Antitrust" by Meltzer in *The University of Chicago Law Review*, Vol. 33 at pp. 683-684:

"The reason for the Court's emphasis on the alleged lack of any economic interrelationship between the peddlers and the processors' employees is not wholly clear. That emphasis seemed to be related to the Court's recognition that in some cases unions may legitimately organize ostensibly independent contractors who are functionally employees. But in such cases appropriate characterization would appear to depend on the functional role of the disputed group and not solely on whether the disputed group competes with individuals who are employees. Thus, the Court's emphasis implies that if the missing economic interrelationship between the two groups had been found to exist, it would have been permissible for the union to cartelize the peddlers even though they had properly been characterized as 'independent contractors' rather than employees.

"The basis for that position appears to be that businessmen-workers, such as the peddlers, are directly substitutable for unionized employees and, accordingly, that the organization of the businessmen is necessary for preserving union standards applicable to employees.

11. A free-market, private-enterprise system has its most reliable balancing factors in free competition and free entry for everybody into the market. Defendant Unions in combination with non-labor groups prevent free competition and free entry by the cumulative efficiency of their numerous commercial restraints. Together with conniving or harassed businessmen, like leader-employers, defendant Unions have established cost structures and price levels for leaders and the public which the courts and administrative agencies are asked to take as *data* for the industry or as the natural law thereof. Unions should not be permitted in this way to present plaintiffs, the public and the courts with *faits accomplis*.

Unions are no different from other human institutions in an area like labor relations where the law largely allows the parties to be guided by their own views of self-

(Footnote continued.)

"An appealing argument could thus be made for permitting unions to regulate the prices, hours, etc. of businessmen who are directly substitutable for unionized employees and who could be wholly excluded from dealing with unionized firms.

"There are, however, weighty opposing considerations. Such unionization collides with the tradition of 'encouraging self-employer economic units as a counter-movement to what are deemed to be the dangers inherent in excessive concentration of economic power.' The Taft-Hartley Act responded to that tradition by seeking to limit situations in which 'independent contractors' were classified as 'employees' and by proscribing union pressures designed to force the self-employed into unions. To read the Sherman Act to give a more expansive reach to 'employees' than was provided for by Taft-Hartley would be inconsistent with the purpose reflected in the latter statute. Such a reading would, moreover, be paradoxical in that it would disregard that the objective of the Sherman Act is to limit concerted activities by businessmen, while the objective of Taft-Hartley is to protect concerted activities by 'employees.' Under such circumstances it would be strange indeed to have a broader definition of 'employees' under the Sherman Act than under Taft-Hartley. Furthermore, the interdiction of price fixing by businessmen-workers would operate, albeit modestly, as a check on union power. Indeed, the resultant check would not be essentially different from that provided by large firms offering products or services that could be economically substituted for unionized labor. Thus, the logical implication of the argument for union cartellization of businessmen-workers is that the union should be able to cartellize and fix prices of firms whose output may erode union standards. Finally, cartellization of businessmen-workers may be designed to and may operate to provide monopoly gains to businessmen rather than to protect the integrity of union standards." S. Meltzer; *ibid.* (pp. 684-685).



interest. From a legal, moral or economic aspect unions are not good *per se*. Their valuation depends upon the moral, legal and economic judgments and policies of their officers and members. Justice is a *human* virtue, not really that of an institution or instrument like a union or an employer association. Collective bargaining was designed to balance union acquisitiveness and self-interest to protect not only the employer but more importantly the public. The balancing effect of collective bargaining has never been exerted under the long AFM regime, where the largest number of employers (orchestra leaders), who employ the largest number of musicians, have been systematically denied the right to be heard at the bargaining table.\* This has meant (because of the AFM dictatorship) that significant moral, legal and economic judgments for the industry and its public (including purchasers of music) have been made largely by union officials and, occasionally, by employee musicians, without the checks and balances provided by bargaining with leader-employers. The latter's attendance at price-list meetings, where it is permitted, is meaningless, since employee musicians can and do always out-vote them. Nor, especially in the light of Union bylaws and other circumstances described in the record, is collective bargaining allowed half a chance where the involved employers are forced into or voluntarily sign up with Unions, thus subjecting themselves to Union bylaws unilaterally made by Union officers and enforced by Unions in combination with many non-labor groups. It is incongruous, in view of the usual patterns of industrial relations, that employers should be active members of the same Union which purports to represent their employees. Furthermore, collective bargaining is generally not a wealth-creating but rather a wealth-distributing process. Defendant Unions, by their commercial restraints in com-

---

\* See 164 N.L.R.B. No. 8 concerning orchestra leader Cutler and 165 N.L.R.B. No. 110 *re* orchestra leaders Doerner and Glasser.



bination with labor groups, *unilaterally* regulate, meddlesomely interfere with and dominate *both* the wealth-creating process by which leaders get engagements providing jobs for employee-musicians and the orchestra leader's process of distributing wages among employee-musicians. In these interferences, defendant Unions are aided by their control over and combination with booking agents, hotels, nightclubs, restaurants, dance-hall operators and those orchestra-leader-employers who collaborate with said Unions and who either welcome or do not object to the involved commercial restraints. Many of the latter enjoy being protected from competition by the Unions.

12. The Court below seemed (with one exception, p. 163, where it stated the rule of *Allen-Bradley*) to emphasize repeatedly (pp. 163-164, 165, 167) the need for a *conspiracy* rather than a *combination*. Since the Sherman Act can be violated by a contract, combination or conspiracy, said emphasis creates a precedent which is in principle erroneous. The statute and case law make no distinction respecting *who* originates the contract, combination or conspiracy or *when*. In reason, it should not matter who initiates the vehicle (contract, combination or conspiracy) for commercial restraint under the *Allen-Bradley* line of cases. As long as Union and employers combine to impose the restraint, the *Allen-Bradley* rule should apply. The alternative is *carte blanche* to all such combinations, and aggrandizement of already swollen union power.

13. Judge Friendly, in discussing the various shades of involvement in the musical industry of different orchestra leaders makes much of the wide "spectrum" of their attachment to their profession. He, and sometimes the majority, neglect the indisputable fact that *plaintiffs* and leader-employers like them, constituting something less than 2% of AFM members, are full-time, professional

orchestra-leader-employers<sup>19</sup> who never or who very rarely work as employee musicians; and who—all of them—earn their livelihoods from their profession. About 90% of all “orchestra leaders” exhibit little participation in the industry. (No plaintiff is in that group.) The engagement contracts, filed by this 90% with AFM locals, are for performances as leaders less than 10 times in 9 months (Defendants’ Exhibits L and M). Such “orchestra leaders” usually play as *employee* musicians and by profession are sidemen, not professional orchestra leaders. Plaintiffs and the relatively few leader employers like them should not be put in the same category with such occasional “orchestra leaders.”

14. Under no authoritative theory of labor jurisprudence, is *coercion of employers into the same union which represents their employees defensible*. The interests of leader-employers are quite different from those of sidemen (508, 3657, 3659, 3666-67).—Recently leader-employers were for the first time excluded from Local 802 Price List meetings precisely because they were employers (Plaintiffs’ Exhibit 219). An employer member of the Unions cannot properly or successfully sit on both sides of the bargaining table. He cannot practically (or lawfully in New York<sup>19</sup>) act as a union officer (508, 1950-51; 2497-98, 3498, 3657). In those AFM Locals where employers are allowed to participate in discussions of wages and prices, the leader is always outnumbered and outvoted (1950-51, 2497-98, 3498). Defendant Unions place upon leader-employers duties and burdens which are more onerous than those placed on members who are employee-musicians. Leader-employers are expected to pay more work-dues, to pay welfare contributions, to file reports; etc. (Sidemen-members are required to do none of these things.) At best, leader-employers are second-class Union members, treated as such by Union officers.

<sup>19</sup> Labor Law: Article 20-A, Section 723(1)(a). See footnote 11, *supra*.

15. Antitrust suits against AFM and its Locals have already been filed or will be filed by orchestra-leader-employers and others in Chicago, Boston, Kansas City, Los Angeles and other places. All of them ask for the comprehensive relief sought by plaintiffs-respondents here. An equally comprehensive treatment of all of the issues raised by the complaint here will doubtlessly obviate the need for a multiplicity of suits to curb AFM pretensions to dictatorship over the musical industry in combination with non-labor groups. The Form B contract,<sup>20</sup> on its face and in practice largely a means used by defendants for price-fixing, is one of the chief targets.

16. Numerous AFM bylaws place unreasonable restrictions on interstate commerce, especially when they are considered cumulatively. Those bylaws are admittedly enforced as they are written (8, 21, 25-26, 35, 64, 151-2).

17. The existence of a class of orchestra-leader-employers cannot be denied. It was presupposed by the Trial Court and by the Court of Appeals in the texts of their opinions. It is constantly presupposed by AFM and Local bylaws and practices, which sharply differentiate between leaders and sidemen (Plaintiffs' Exhibit 219).

The record facts show that the Union conduct challenged by the complaint is dictated by a generalized Union policy of antitrust violations in combination with non-labor groups. The Unions have enforced and, upon past showing, intend vigorously to enforce this policy through an efficiently developed system of policing all musical engagements performed within their geographical

<sup>20</sup> It deserves notice that the AFM-required form was somehow discarded by Local 802, which, despite (and without amending) AFM and Local bylaws making the AFM bylaws binding on Locals, replaced the Form B in May, 1967, with a new engagement contract form to be found in Appendix C. It demonstrates that despite the Court of Appeals' condemnation of AFM price fixing, that activity and Union regimentation in combination with employers still goes on apace.

jurisdictions. The Unions' generalized policies involve a group always and necessarily recognized as such now called "leader-employers." As Appendix C shows, all members of this group are expected by Unions to sign contracts, etc. Under the doctrine of *NLRB v. International Union of Operating Engineers, Local 571*, 317 F. 2d 638, 643-44 (C.A. 8) and the authorities cited in that case: "the Board is justified in broadening its order to include similar unlawful practices if there is evidence in the record of some general scheme or design or proclivity for such unlawful practices."

A similar rationale should apply to courts under Rule 23 of the Federal Rules of Civil Practice, regardless of the acuties and refinements of judicial construction concerning "spurious class" action, etc. It was not even possible for the Courts below to discuss the record facts in these cases without referring, time and again, to a real class of leader-employers; i. e., professional orchestra leaders.

### Conclusion.

**For the foregoing reasons this cross-petition for a writ of certiorari should be granted.**

Dated: New York, N. Y., June 29, 1967.

Respectfully submitted,

Attorney for Plaintiffs-Respondents.

**APPENDIX A.****SHERMAN ANTI-TRUST ACT**

26 Stat. 209, 15 U.S.C., Secs. 1 and 2  
(approved July 2, 1890)

SEC. 1. Every contract, combination in the form of trust or otherwise; or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

**APPENDIX B.****NORRIS-LAGUARDIA ACT**

47 Stat. 90, 29 U.S.C., Sec. 101  
(approved March 23, 1932)

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.



## APPENDIX C.

In May, 1967, Local 802 replaced the Form B contract with the following form which its Executive Board now imperates for use by all "Leader-Employers." It indicates, by the italicized language (not emphasized in the original), Union continuance of price fixing:

AGREEMENT made the            day of  
196 , by and between            of

(Herein called the "Leader-Employer") and the ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, A. F. of M. (herein called the "Union").

WHEREAS, the Leader-Employer is desirous of employing members of the Union for musical performances in the single engagement field, and the Union is willing to have its members work for the Leader-Employer on the payment to them of applicable Union wage scales and the compliance by the Leader-Employer of all applicable Union rules and regulations, as well as of the terms set forth below.

NOW, THEREFORE, in consideration of the premises, it is agreed as follows:

1. The Leader-Employer will notify the Union in writing, within            days after entering into any contract with a client or purchaser of music for the performance of music in the single engagement field, of the date, time and place of such engagement, and the number of musicians, including the Leader who will be performing on the engagement.

2: *The Leader-Employer warrants that any such contract which he will enter into will provide for—*

(a) *Sufficient monies to be paid by the client or purchaser of music, so that each musician performing on the engagement, including the Leader, will be paid at least the current minimum wage scales required by Article X of the Local 802 By-Laws applicable to the particular engagement for the hours to be worked and any extras provided for in the contract.*

(b) *Sufficient monies for the specific payment of One Dollar (\$1.00) for each musician performing on the engagement, including the Leader, as contributions to the Local 802 Musical Engagements Welfare Fund. The Leader-Employer agrees that he will be responsible for the collection and payment of these contributions to the said Welfare Fund; and he further agrees to be bound by the terms of the Agreement and Declaration of Trust made the 22nd day of April, 1954, between the Hotel Men's Committee for Hotel Users of Music, the Restaurant League of New York, the Associated Musicians of Greater New York, Local 802, and the Trustees of the said Fund, as amended.*

(c) *Sufficient monies to be paid by the client or purchaser of music to cover the costs of Unemployment Insurance, Social Security, New York State Disability Benefits Insurance and Workmen's Compensation for each musician performing on the engagement.*

3. The Leader-Employer will supply to the Union, on forms to be supplied by the Union, the name, card number and scale earnings of each musician who performed on the engagement. Such forms, together with the required payments to the Welfare Fund, will be returned within fourteen (14) days after they have been mailed

by the Union. If the Leader-Employer has authorizations from the musicians to do so, he will also forward with this form payment of the Union's work dues checked-off from their earnings.

Dated,

196 .

Leader-Employer

ASSOCIATED MUSICIANS OF GREATER NEW YORK,  
Local 802, A. F. of M.

LOUIS CRITELLI, Secretary  
Local 802, A. F. of M.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1967

—  
No. 310  
—

JOSEPH CARROLL ET AL., *Petitioners,*

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED  
STATES AND CANADA, ET AL., *Respondents.*

—  
Petition for a Writ of Certiorari to the United States Court of  
Appeals for the Second Circuit  
—

**BRIEF FOR RESPONDENTS IN OPPOSITION**

—  
HENRY KAISER  
EUGENE GRESSMAN  
GEORGE KAUFMANN  
RONALD ROSENBERG  
1730 K Street, N. W.  
Washington, D. C.

*Attorneys for Respondents*

*Of Counsel:*

EMANUEL DANNETT  
JEROME ADLER  
DAVID I. ASHE

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1967

---

No. 310

---

JOSEPH CARROLL ET AL., *Petitioners*,

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED  
STATES AND CANADA, ET AL., *Respondents*.

---

Petition for a Writ of Certiorari to the United States Court of  
Appeals for the Second Circuit

---

**BRIEF FOR RESPONDENTS IN OPPOSITION**

---

**INTRODUCTION**

Plaintiffs seek review of the judgment below which, with one significant exception, affirmed the dismissal of their complaint by the District Court.<sup>1</sup> Their Peti-

---

<sup>1</sup> The exception is the holding of the Court of Appeals that defendant unions violated the anti-trust law by establishing the minimum "price" which the purchaser of music must pay on club-date musical engagements, which is the subject of defendants' Petition, No. 309, of this term. That Petition, and the opinions of both lower courts reprinted therein, will be cited as (Pet. #309, p. —). Plaintiffs' Petition in No. 310 will be cited by page number (p. —).



tion for Certiorari raises twenty-seven Questions Presented. Throughout the Petition factual assertions are made which are unsupported by the meticulous findings of the District Court, which were left undisturbed by the Court of Appeals; many of those assertions are incomplete, misleading, or actually contrary to the findings.<sup>2</sup> Under the rubric "Additional Union Practices" (pp. 11-18) plaintiffs deal at length and seemingly at random with various matters which they deem objectionable; many of these have not previously been involved in this suit, or are entirely irrele-

---

<sup>2</sup> It would be neither feasible nor useful to the Court to expose all these misstatements, but one example, dealing with an issue fully litigated at trial, should be sufficient to measure the reliability of plaintiffs' assertions.

Plaintiffs flatly state (p. 15) that recording and television companies are not the employers of the musicians. But the District Court expressly found that plaintiff Cutler, as an orchestra leader, was an employee in both fields. (Pet. # 309, p. 70a.)

Again calling the leader the "employer" on recording engagements, plaintiffs say that "he is saddled with the expense of employer payroll taxes and contributions. (p. 16). But the District Court found, "The recording company withholds and pays over to the appropriate governmental agencies federal and state withholding taxes and social security taxes for all musicians, including the orchestra leader." (Finding 67, Pet. #309, p. 42a).

Subsequently, plaintiffs say "During recording sessions, orchestra-leader-employers are in control (3857; 1078-1080; 1198-1203) but Unions exaggerate the control of the A&R man for their own purpose." (p. 17). But the District Court found that an "employee of the recording company known as the 'artist and repertoire representative' (the 'A&R man') has the ultimate responsibility for the musical product embodied in the phonograph recording." (Finding 63, Pet. #309, p. 41a). The District Court described the control exercised by the "A&R man" in detail. (Findings 63-65, Pet. #309, pp. 41a-42a). These findings were based on uncontradicted evidence, cited therein, which consisted mainly of the testimony of an "A&R man" called as a witness by plaintiffs, and the head of the "A&R department at Columbia Records.

vant to any antitrust issue decided below.<sup>3</sup> See also Par. 8, pp. 23-24, listing sixteen alleged forms of defendants' "unmitigated commercial restraints and tyranny". These sweeping allegations, and plaintiffs' unbridled use of invective and emotionally charged language hardly promote consideration of the issues which were decided against plaintiffs below and which alone are properly the subject of their present Petition. Under the heading, "Reasons for Granting the Writ", petitioners set forth seventeen separately numbered paragraphs which have no readily discernible relation to the twenty-seven Questions Presented, and which only fleetingly attempt to show that the Questions Presented meet the standards for this Court's exercise of its *certiorari* jurisdiction as stated in Rule 19. Consequently plaintiffs' Petition comes squarely within Rule 23(4), which provides as follows:

"The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

---

Its formal deficiencies are sufficient reason for denial of plaintiffs' Petition. However, we shall briefly discuss the merits in order that the Court may satisfy itself that review of the judgment below, insofar as it rejects plaintiffs' claims, is not warranted.

Analysis of this case is fortunately simplified by the careful and elaborate findings, copiously annotated to

---

<sup>3</sup> Again we shall limit ourselves to one example. Plaintiffs assert it to be unlawful *under New York State law* for orchestra leaders to be union officers (p. 15, n. 11). There is no allegation in the complaint on this issue.

the record, which were made by the District Court. As these findings were not disturbed by the Court of Appeals they come within the settled rule that this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275; *Berenyi v. Immigration Director*, 385 U.S. 630, 635. No "very obvious and exceptional showing or error" is or can be made by plaintiffs with regard to these findings. The issues which were decided against plaintiffs below, and which are subject to review on their petition are enumerated by the Court of Appeals in its Opinion. Pet. No. 309, pp. 10a-11a. Before discussing these issues individually, we shall examine three critical assumptions which are made throughout plaintiffs' petition:

- 1) Plaintiffs continuously claim that orchestra leaders are "employers" regardless of the nature of the musical engagement. However, the courts below determined leaders to be employers only on club-date engagements and expressly found them to be employees on recording and television engagements. See n. 2, *supra*. While such determinations raise mixed questions of law and fact and are thus not subject to the two-court rule, plaintiffs' Questions Presented do not challenge them.

- 2) Plaintiffs assume in fourteen of their Questions Presented and six of the separately numbered paragraphs of their "Reasons" that orchestra leaders are members of a "non-labor group". Under this Court's decisions, discussed at Pet. No. 309, pp. 9-11, combination with a non-labor group is the *sine qua non* of anti-trust liability for labor unions. Accordingly "labor group" is a concept with significant legal consequences,

and the conclusion of both courts below (*id.* pp. 23a, 71a-72a) that leaders are members of a labor group is not binding here. But the conclusion below is eminently correct. It is firmly grounded in the District Court's factual findings. (*id.* pp. 34a-36a, discussed *id.* at pp. 4-5). Plaintiffs assert that the definition of the antitrust exemption for labor groups in *Meat Drivers v. United States*, 371 U.S. 94, 103 is mere *dictum*. But clearly, it is a carefully considered limitation of the Court's decision affirming the injunction which the District Court had entered against membership of certain individuals, the grease peddlers, in the Meat Drivers union. The evident purpose of this passage was to preserve the authority of *Milk Wagon Drivers Union v. Valley Farm Products*, 311 U.S. 91 and later cases which uphold the right of unions to regulate the earnings of those who are in job and wage competition with their members. While plaintiffs complain that the definition of "labor group" in the *Meat Drivers* decision is "vague" (Pet., p. 30), we think that it correctly defines the considerations relevant in identifying whom unions are privileged to regulate under the labor exemption to the antitrust laws. Moreover, since there is demonstrated job and wage competition between leaders and employee members, there is no occasion in this case for this Court to consider the scope of other forms of "economic interrelationship" which would qualify persons as members of a labor group.<sup>4</sup>

---

<sup>4</sup> The District Court held, correctly we think, that a sufficient economic interrelationship was demonstrated between musicians and booking agents and caterers in order to justify including them in a labor group. Pet. No. 309, pp. 77a-79a. The issue need not be reached because the Court of Appeals held that plaintiffs did not have standing to challenge the unions' regulations of these groups.



3) Because the existence of job and wage competition between leaders and other musicians is the heart of the case, it is the object of plaintiffs' strongest verbal barrage (Pet. pp. 26-30), including a flat statement that such competition is "unproved in the record but merely alleged there, in general, conclusory language by Union officers" (p. 26). However, the existence of such job and wage competition was not only abundantly established on the record but is the subject of careful findings by the District Court. These were not disturbed on appeal (Pet. No. 309, pp. 34a-36a), and are protected by the Two-Court Rule. Given these findings regarding the realities, we think no purpose would be served by minute analysis of plaintiffs' labyrinthine theorizing as to why such competition is impossible.

Once plaintiffs' basic assumptions have been examined and rejected, their individual claims are readily disposed of. (We discuss them in the order they were listed by the Court of Appeals.)

Union regulations fixing the minimum number of employees to perform particular work have been held exempt from the antitrust laws. *United States v. Carozzo*, 313 U.S. 539; *United States v. American Federation of Musicians*, 318 U.S. 741. Plaintiffs neither mention these decisions nor show any reason why their authority should be disapproved.

The unions' territorial restrictions on the operations of leaders and sidemen were found below to promote local work opportunities of employee members. Plaintiffs do not appear to challenge this factual finding; cf. *Meat Cutters v. Jewel Tea*, 381 U.S. 676. Immunity of such demands from the antitrust laws has long been settled as is shown by the decisions cited by the courts below. (Pet. No. 309, pp. 20a-21a, 79a-80a.) These



travel restrictions are enforced through union by-laws and without combination with any non-labor group.<sup>5</sup>

Plaintiffs' claim that defendants monopolize the music industry, that is that they enforce closed shops, was correctly disposed of below on the authority of *United States v. American Federation of Musicians, supra*.

The courts below correctly held that a refusal to bargain by a union does not constitute a violation of the antitrust laws. *Hunt v. Crumboch*, 325 U.S. 821. Plaintiffs assert that the *Hunt* case should be overruled or modified because of the enactment of the Taft-Hartley Act which forbids the closed shop and imposes on unions the obligation to bargain with employers upon demand in certain situations. However, in enacting Taft-Hartley Congress did not choose to expand union liability under the Antitrust laws. Rather it determined that the legality of the union activities which it banned should be regulated, and if necessary remedied, by the National Labor Relations Board. Even where union activities were subject to court action at the instance of injured parties the remedies of the antitrust laws were avoided. See *Teamsters Union v. Morton*, 377 U.S. 252, 260 note 16. Plaintiffs assert, "Collective bargaining was designed to balance union acquisitiveness and self-interest to protect not only the employer but more importantly the public." (p. 32). But see *American Steel Foundries v. Tri-City Trades Council*, 257 U.S. 184, 209 and § 1 of the National Labor Relations Act, 29 U.S.C. § 151.

<sup>5</sup> The Court of Appeals relied additionally on its view that such restrictions constitute mandatory subjects of bargaining. While we agree with this view, we submit that the availability of the labor exemption does not depend thereon. See Pet. No. 309, pp. 12-14.

The court below correctly held that the unions efforts to compel orchestra leaders to become members do not violate Antitrust laws. There is no reason now to upset the settled course of decision on this issue from *Lake Valley, supra*, through *Meat Drivers, supra*.

The determination by the Court of Appeals that plaintiffs showed no injury authorizing them to challenge the defendants' regulations regarding booking agents and caterers is obviously factual and raises no issue warranting review. Nor does its refusal to decide whether plaintiffs' suit qualifies as a "spurious class action" qualify for review. The Court's conclusion that the suit is not a "true class action" is eminently sound in light of the findings of conflict within the class which plaintiffs claim to represent. The limitations on true class actions, based on elemental concepts of due process, cannot be overcome by bald claims (pp. 35-36) that a "class" or "group" exists.

### CONCLUSION

By reason of the foregoing, plaintiffs' Petition for Certiorari should be denied.

Respectfully submitted,

HENRY KAISER  
EUGENE GRESSMAN  
GEORGE KAUFMANN  
RONALD ROSENBERG  
1730 K Street; N. W.  
Washington, D. C.

*Attorneys for Respondents*

*Of Counsel:*

EMANUEL DANNETT  
JEROME ADLER  
DAVID I. ASHE

**LIBRARY**  
**SUPREME COURT. U. S.**

U.S. Supreme Court, D.C.

**FILED**

**SEP 29 1967**

**JOHN F. DAVIS, CLERK**

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1967

\_\_\_\_\_  
No. 309  
\_\_\_\_\_

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED  
STATES and CANADA and ASSOCIATED MUSICIANS OF  
GREATER NEW YORK LOCAL 802, ET AL., *Petitioners,*

v.

JOSEPH CARROLL ET AL., *Respondents.*

\_\_\_\_\_  
On Petition for a Writ of Certiorari to the United States Court  
of Appeals for the Second Circuit  
\_\_\_\_\_

**REPLY BRIEF FOR PETITIONERS**

\_\_\_\_\_  
HENRY KAISER  
EUGENE GRESSMAN  
GEORGE KAUFMANN  
RONALD ROSENBERG  
1730 K Street, N.W.  
Washington, D. C.

*Of Counsel:* *Attorneys for Petitioners*

EMANUEL DANNETT  
JEROME ADLER  
DAVID I. ASHE

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1967

---

No. 309

---

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED  
STATES and CANADA and ASSOCIATED MUSICIANS OF  
GREATER NEW YORK LOCAL 802, ET AL., *Petitioners*,

v.

JOSEPH CARROLL ET AL., *Respondents*.

---

On Petition for a Writ of Certiorari to the United States Court  
of Appeals for the Second Circuit

---

**REPLY BRIEF FOR PETITIONERS**

---

I

Nowhere in their papers do plaintiffs even suggest that the questions presented herein are unimportant. It deserves the emphasis of repetition, however, that the impact of the decision below is not limited to one industry or one union. The holding that union activities can be denied the labor exemption to the anti-trust laws despite the absence of any combination with a non-labor group reverses the law as it has been estab-

lished since *United States v. Hutcheson*, 312 U.S. 219, with respect to all labor organizations. The holding that only activities relating to mandatory subjects of bargaining come within the labor exemption will jeopardize existing agreements and inhibit collective bargaining in all industries. The further holding that an agreement restricting an employer in his performance of employee work is not a mandatory subject of bargaining, affects not only musical club dates, but also trucking, the building trades, the garment industry, and numerous others where employers work at the trade.

While the questions presented thus merit review on the basis of their broad significance, we urge that the devastating impact of the decision below on petitioner unions is an additional ground for granting *certiorari*. As plaintiffs themselves point out, (Opp. p. 3)<sup>1</sup> the regulations invalidated deal with the most prevalent form of musical employment, club-date single engagements. As the trial Court found (Pet, pp. 72a-75a) and the Court of Appeals did not dispute, these regulations are essential to the preservation of job and wage standards in this segment of the musical industry. While the judgment below immediately affects only the four individual plaintiffs, it imposes on the unions the choice of abandoning historic and indispensable practices or facing years of further expensive litigation. In their Petition for Certiorari in No. 310 (p. 35), plaintiffs warn that similar suits

---

<sup>1</sup> Lest the Court be misled, however, we should note that the record is silent on the relative percentages of single and steady engagements, so that plaintiffs' figure (Opp. p. 3) is wholly spurious.



will be filed "in Chicago, Boston, Kansas City, Los Angeles, and other places". This is not an empty threat; such suits have already been filed in Chicago and Brooklyn.<sup>2</sup> Thus, the administration of justice would also be promoted by granting *certiorari*.

## II

The first Question Presented by our Petition is whether union regulations can be denied the labor exemption in the absence of a finding that it has combined with a non-labor group.<sup>3</sup> Plaintiffs assert that that question does not arise in this case, claiming that the Court of Appeals did not find them to be members of a labor group. (Opp. pp. 9, 10) This contention is squarely refuted by examination of the Court of Appeals' opinion.

---

<sup>2</sup> *National Association of Orchestra Leaders, et al. v. American Federation of Musicians, et al.*, Northern District of Illinois, Case No. 67-C-917; and *Nat Brooks v. Associated Musicians of Greater New York, Local 802, American Federation of Musicians*, Eastern District of New York, Case No. 67 Civ. 706.

<sup>3</sup> In their Opposition to our Petition for Certiorari, plaintiffs make numerous factual assertions which are either contrary to the findings of fact of the District Court as approved by the Court of Appeals, or unsupported by any evidence in the record. They also address themselves to issues which do not appear to have any relation to the questions presented by our Petition. We think no purpose would be served by a reply to those misstatements, factual or legal, which do not bear immediately on those questions.

Nevertheless, we cannot leave unanswered the accusation that "plaintiffs Carroll and Peterson were expelled as a reprisal for the institution of the instant antitrust suits" (Opp. p. 9). This charge contradicts plaintiffs' allegations made in support of their application for a stay, which was denied by Mr. Justice Harlan, that the expulsions were for disobeying the price regulations here in issue. Both charges are false. See Findings 4 and 5 made by the District Court, after trial (Pet. No. 309, pp. 29a-30a).

In passing on the claim that the union violated the antitrust laws by establishing the minimum price which the leader must charge to the purchaser of the music, the Court of Appeals first addressed itself to plaintiffs' reliance on *Allen Bradley Co. v. Local 3*, 325 U.S. 797:

"Under the appellants' view of this case, there is a conspiracy by the unions with 'non-labor' groups to engage in practices which are unlawful, because they are in restraint of trade. *But the facts do not support such a conclusion.*" Pet. p. 15a (emphasis supplied)

That the Court below determined leaders to be members of a "labor group" is likewise demonstrated by its holding that it is not a violation of the antitrust laws to compel them to join the union. In reaching this result, the Court of Appeals applied the test for identifying a "labor group" set forth in *Meat Drivers v. United States*, 371 U.S. 94: whether there is job and wage competition or other economic relationship between the regulated group and employees. Although the Court did not use the phrase "labor group" in this part of the opinion, it expressly approved the District Court's finding of job and wage competition between leaders and other musicians who concededly are employees.<sup>4</sup>

---

<sup>4</sup> Nor do any of the cases cited by plaintiffs (Opp. pp. 7-8) support their claim not to be members of a labor group. This concept bears only on the scope of the labor exemption to the antitrust laws. Since each of the cited cases arose under other statutes, they did not deal with this classification. Indeed, contrary to plaintiffs' implication, it remains an open question before the NLRB whether leaders in the club-date field are employees or employers. The parties stipulated to the leaders' status in the *Cutler* and *Glasser* cases, and the Board expressly withheld decision of the issue in *Republic Productions*, 153 N.L.R.B. 68, 69, n.2.

Faced with the test of union antitrust liability established by this Court's decisions, plaintiffs again deny the existence of such competition (Opp. pp. 9-10, 16, and 18-19, see also their Petition in No. 310, pp. 26-30). But they cannot escape the finding of such competition by both courts below. Plaintiffs also renew their attack on *Meat Drivers Union v. United States*, *supra* (Opp. pp. 21 and 23, n. 9).<sup>5</sup> If the Court below had agreed with plaintiffs' view that the language in *Meat Drivers* is mere *dictum* and had concluded that they were not members of a labor group despite the existence of job and wage competition between them and employees, such decision would plainly warrant review. All the more is it warranted here, where the Court, though following *Meat Drivers* to find leaders to be members of a labor group, took the broader position that the antitrust exemption is nevertheless unavailable. Plaintiffs appear to recognize the inconsistency between the holding of the Court below that the unions may not regulate the minimum compensation which leaders must receive and its other holding that the unions were privileged under the antitrust laws to compel leaders into membership. See their Petition in No. 310, challenging the latter. Organization of working employers is permitted and desired precisely in order to enable the union to regulate the conditions under which they may render their services.

---

<sup>5</sup> We are at a loss to understand plaintiffs' argument, (Opp. pp. 21-22) that Mr. Justice Stewart's concurring opinion in *Fibreboard Paper Products v. Labor Board*, 379 U.S. 203, 217, undermines the authority of his opinion for the Court in *Meat Drivers*, for the two opinions deal with entirely different issues.

## III

The second Question Presented by our Petition is whether the union regulations were properly invalidated under the Sherman Act on the theory that they deal with a non-mandatory subject of bargaining. The Court of Appeals' major premise (with which Judge Friendly disagreed) was that the labor exemption to the antitrust laws applies only to regulations or agreements which relate to mandatory subjects of bargaining under the National Labor Relations Act. Plaintiffs say nothing which detracts from the propriety of review of this far-reaching holding.

In support of the Court's minor premise that the regulations here in question do not relate to mandatory bargaining subjects,<sup>6</sup> plaintiffs attempt to distinguish between agreements restricting the right of supervisors to perform bargaining unit work and those regarding performance of employee work by employers. (Opp. pp. 17-18). However, whether a subject is one respecting which the Act requires the parties to bargain depends on its impact on the working conditions of employees, which means in the present context whether it is designed to protect employees' jobs from competition. The effect on employees is, of course, the same whether their jobs are jeopardized by competition from supervisors or from working employers.

Plaintiffs place heavy reliance (Opp. p. 22-23) on Mr. Justice Stewart's concurrence in *Fibreboard Paper*

---

<sup>6</sup> Our Petition inadvertently misquoted the Court's opinion by omitting the second "not" from the following passage: "The cases make it clear, however, that price-fixing generally is not only not a mandatory subject for collective bargaining but is one toward which union activity may not be directed without violating the antitrust laws." (Pet. pp. 19a-20a). We apologize for the oversight.



*Products v. Labor Board* 379 U.S. 203, 217. We submit that they attribute to Mr. Justice Stewart a narrower view of the appropriate scope of collective bargaining than was taken in that opinion. For he and the other Justices who joined in his opinion agreed with the Court that subcontracting was a bargainable subject under the facts in *Fibreboard* because "all that is involved is the substitution of one group of workers for another to perform the same task in the same plant under the ultimate control of the same employer." 379 U.S. at 224. A provision which forbids an employer from performing employee functions qualifies precisely under this test since it substitutes "one group of workers for another to perform the same task". It in no way impinges upon those entrepreneurial decisions which Justice Stewart thought to be outside the area as to which employers could be required to bargain, 379 U.S. at 223-224, although they would be permitted to do so, *id.* at 221, n. 6.

Moreover, it is, of course, the majority opinion in *Fibreboard* which is the governing precedent. The Court there held that "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d)." 379 U.S. at 214. In reaching this result, the Court followed *Teamsters Union v. Oliver*, 358 U.S. 283, where the concern of the union was with the replacement of employees by the independent contractor himself. Because the price which the owner-operator charged for the rental of his truck had a direct impact on employee job opportunities, it was held to be a mandatory subject of bargaining. Here petitioners' concern with the competition of the leader is identical to that of the Teamsters



regarding the competition of owner-operator drivers; and petitioners' response is likewise identical, namely, the regulation of the independent contractor's remuneration.<sup>7</sup> Plaintiffs' sole comment on *Oliver* is that that case "concerned *wages*, not 'price-fixing', as the decision itself pointed out at page 294." (Opp. p. 15, plaintiffs' emphasis). But the very point of *Oliver* was that the test under National Labor Relations Act is not the form of the agreement, be it wages, prices or, as plaintiffs now emphatically proclaim (Opp. p. 19) "*profit*", but the impact upon employee job and wage standards. This was reiterated with respect to the antitrust laws in *Meat Cutters v. Jewel Tea*, 381 U.S. 676, 690, n. 5, the very case on which the majority below relied in declaring petitioners' regulations to be unlawful. We again submit (see Pet. pp. 14-15) that the present case is identical to and controlled by *Oliver*, and that the failure of the Court below to follow *Oliver* itself warrants review and reversal of its judgment.

Respectfully submitted,

HENRY KAISER  
EUGENE GRESSMAN  
GEORGE KAUFMANN  
RONALD ROSENBERG  
1730 K Street, N.W.  
Washington, D. C.

*Of Counsel:*

*Attorneys for Petitioners*

EMANUEL DANNETT  
JEROME ADLER  
DAVID I. ASHE

---

<sup>7</sup> Plaintiffs allege, "Petitioners also misrepresent the price ingredients which they prescribe in their bylaws." (Opp. p. 8) Plaintiffs are in error. The description is in the words of the District Court finding which we cited (No. 79, Pet. p. 46a), which in turn adopted a stipulation of the parties.

DEC 1 1967

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1967

No. 309

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED  
STATES AND CANADA, ET AL., *Petitioners*,

v.

JOSEPH CARROLL, ET AL., *Respondents*.

No. 310

JOSEPH CARROLL, ET AL., *Petitioners*,

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED  
STATES AND CANADA, ET AL., *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE  
AMERICAN FEDERATION OF MUSICIANS, ET AL.

HENRY KAISER  
EUGENE GRESSMAN  
GEORGE KAUFMANN  
RONALD ROSENBERG

1730 K Street, N.W.  
Washington, D. C. 20006

*Counsel for American  
Federation of Musicians,  
et al.*

*Of Counsel:*

EMANUEL DANNETT  
JEROME H. ADLER  
DAVID I. ASHE



## INDEX

	Page
Opinions Below .....	1
Jurisdiction .....	2
Questions Presented .....	3
Statutory Provisions Involved .....	3
Statement of the Case .....	4
The Facts .....	6
A. Employment Relationships in the Music Industry .....	6
B. The Union Activities and Regulations Attacked by Appellants .....	10
The Proceedings Below .....	18
1. The District Court .....	18
2. The Court of Appeals .....	20
Summary of Argument .....	22
Argument	
I. The Unions may Lawfully Regulate the Leader's Minimum Income when He Performs ..	31
A. The "Crucial Determinant" is the Job and Wage Competition Between Leaders and Employee-Musicians .....	31
B. Because of Job and Wage Competition, the Regulation of the Performing Leader's Income is Lawful Under this Court's Anti-trust Precedents .....	43
1. Because of Job and Wage Competition, Regulation of the Performing Leader's Minimum Income Lawfully Eliminates	

	Page
Price Competition Based on Differences in Labor Standards .....	44
2. Because of Job and Wage Competition, There was no Combination Between the Unions and a Non-Labor Group .....	47
3. Because of Job and Wage Competition, Regulation of the Performing Leader's Minimum Income Deals with a Manda- tory Bargaining Subject .....	51
II. The Unions' Regulations of the Non-Perform- ing Leader's Income are Lawful .....	57
III. The Practices Challenged in No. 310 are Lawful .....	61

## CITATIONS

## CASES:

Allen-Bradley Co. v. Local 3, I.B.E.W., 325 U.S. 797, 807 .....	18, 20, 21, 47
American Steel Foundries v. Tri-City Central Trades Council, <i>supra</i> , 257 U.S. 184, 208 .....	31
Apex Hosiery Co. v. Leader, 310 U.S. 469 ....	24, 44, 63, 69
Associated Musicians of Greater New York, etc., 164 NLRB No. 8 .....	64
Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Wohl, 315 U.S. 769 .....	52
Barker Painting Co. v. Brotherhood of Painters, 23 F. 2d 743 (C.A.D.C.), cert. denied, 276 U.S. 631; 15 F. 2d 16 (C.A. 3), cert. denied, 273 U.S. 743 .....	67
Berenyi v. Immigration Director, 385 U.S. 630, 635 ..	40
Columbia River Packers v. Hinton, 315 U.S. 143 ...	36
Crown Coach Corp., 155 N.L.R.B. 625, 628 .....	55
Cedar Crest Hats v. United Hatters, 362 F. 2d 322, 326	50
Fibreboard Paper Products Corp. v. N.L.R.B., <i>supra</i> , 379 U.S. 203, 215 .....	53, 54, 55
Giordano v. R.C.A., 183 F. 2d 558, 560-561 (C.A. 3)	70
Graver Tank and Manufacturing Company v. Linde Air Products Company, 336 U.S. 271, 275 ....	40



Greenstein v. National Skirt & Sportswear Ass'n, Inc., 178 F. Supp. 681, 689 (S.D.N.Y. 1959) .....	59
Hunt v. Crumboch, 325 U.S. 821, 825 .....	28, 47, 64
Lauf v. E. G. Shinner & Co., 303 U.S. 323, 329 .....	57, 63
Liner v. Jafco, 375 U.S. 301, 307 .....	62
Marine Cooks & Stewards Union v. Panama Steamship Co., 362 U.S. 365 .....	56, 67
Meat Cutters v. Jewel Tea, 381 U.S. 676 .....	21, 23, 38
Meat Drivers v. United States, 371 U.S. 94 .....	19, 27, 35
Milk Wagon Drivers' etc. v. Lake Valley Farm Prod- ucts, 311 U.S. 91 .....	19, 23, 27, 33
Mine Workers v. Pennington, 381 U.S. 657 .....	21, 39
Mishkin v. New York, 383 U.S. 502, 513-514 .....	30
N.L.R.B. v. Bradley Washfountain Co., 192 F. 2d 144, 154 (C.A. 7) .....	56
N.L.R.B. v. Houston Chapter, Assoc. General Contrac- tors of America, Inc., 349 F. 2d 449 (C.A. 5), cert. denied, 382 U.S. 1026 .....	55
N.L.R.B. v. Andrew Jergens Co., 175 F. 2d 130, 134 (C.A. 9) cert. denied, 338 U.S. 827 .....	56
N.L.R.B. v. Tom Joyce Floors, Inc., 353 F. 2d 768 (C.A. 9) .....	55
National Labor Relations Board v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 .....	52
New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 .....	56
Order of Railroad Telegraphers v. Chicago & N.W.R. Co., 362 U.S. 330 .....	56
Rambusch Decorating Co. v. Brotherhood of Painters, 105 F. 2d 134 (C.A. 2) cert. denied, 308 U.S. 587 .....	67
San Diego Unions v. Garmon, 359 U.S. 236, 243, 247 .....	62
Senn v. Tile Layers' Union, 301 U.S. 468 .....	32, 57
Teamsters Local v. Labor Board, 365 U.S. 667, 676-677 .....	55
Teamsters Union v. Morton, 377 U.S. 252, 260-261 ..	62
Teamsters Union v. Oliver, 358 U.S. 283 .....	23, 34, 51
United States v. A.F.M., 318 U.S. 741, 743 .....	27, 56, 63
United States v. Carrozzo, 37 F. Supp. 191 (N.D. Ill.) affirmed, 313 U.S. 539 .....	63
United States v. Drum, 368 U.S. 370, 382 .....	38
United States v. Hntcheson, 312 U.S. 219 .....	25, 47, 56
United States v. International Hod Carriers, etc., 313 U.S. 539 .....	57

STATUTES:	Page
Clayton Act, 38 Stat. 730, 15 U.S.C. 12, <i>et seq.</i> :	
Sec. 6 .....	3, 44
Sec. 20 .....	3, 47
Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. 101, <i>et seq.</i> :	
Sec. 4 .....	3, 47, 63
Sec. 13 .....	3, 63
Sherman Act, 26 Stat. 209, 15 U.S.C. 1, <i>et seq.</i> :	
Sec. 1 .....	3, 45, 47

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1967

---

No. 309

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED  
STATES AND CANADA, ET AL., *Petitioners*,

v.

JOSEPH CARROLL, ET AL., *Respondents*.

---

No. 310

JOSEPH CARROLL, ET AL., *Petitioners*,

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED  
STATES AND CANADA, ET AL., *Respondents*.

---

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

---

BRIEF FOR THE  
AMERICAN FEDERATION OF MUSICIANS, ET AL.

---

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (App. 180) is reported at 372 F. 2d 155. The opinion of the District Court for the Southern District of New York (App. 124) is reported at 241 F. Supp. 865.

## **JURISDICTION**

The judgment of the Court of Appeals (App. 207) was entered on January 30, 1967. In accordance with orders of Mr. Justice Harlan extending the time for filing (App. 208, 209), the petitions for writs of certiorari in No. 309 and No. 310 were filed on June 29, 1967. On October 9, 1967, this Court granted the respective petitions for writs of certiorari and consolidated the two cases for oral argument (App. 210). The Chief Justice and Mr. Justice Marshall took no part in the consideration or decision of these petitions. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## **QUESTIONS PRESENTED**

In No. 309 the following questions are presented:

1. May union regulations, designed to preserve employee job and wage standards, be denied the labor exemption to the antitrust laws, although the union has not combined with any non-labor group in their enforcement?
2. May union regulations, which preserve employee wage standards by establishing the minimum compensation which an employer must receive for work performed in competition with its members, be declared unlawful under the Sherman Act on the theory that they deal with a non-mandatory subject of bargaining?

In No. 310, plaintiffs-petitioners raise twenty-seven separately numbered questions presented. We believe, however, that of the questions raised only the following

are presented by the portions of the judgment below adverse to plaintiffs:

1. Do defendants violate the Sherman Act by compelling orchestra leaders to become members?
2. Do union regulations imposing minimum employment quotas violate the Sherman Act?
3. Is the failure of a union to bargain collectively in the club-date field a violation of the Sherman Act?
4. Does the enforcement of closed shops by unions violate the Sherman Act?
5. Do unions violate the Sherman Act by protecting local workers from competition of workers coming from other jurisdictions?
6. Do plaintiffs have standing to challenge defendants' regulations of booking agents? If so, do these violate the Sherman Act?
7. Do defendants combine with caterers in violation of the antitrust laws?
8. Is there a class of orchestra-leader-employers within the meaning of Rule 23 FRCP?

#### **STATUTORY PROVISIONS INVOLVED**

These cases involve § 1 of the Sherman Act, 26 Stat. 208, 15 U.S.C. § 1; §§ 6 and 20 of the Clayton Act, 38 Stat. 731 and 738, 15 U.S.C. §§ 17 and 29 U.S.C. § 52; and §§ 4 and 13 of the Norris-LaGuardia Act. 47 Stat. 70 and 73, 29 U.S.C. §§ 104 and 113. These are reprinted in pertinent part in the Appendix hereto, pp. 72 *infra*.



## STATEMENT OF THE CASE

### INTRODUCTION

This is an action under the Sherman Antitrust Law, 15 U.S.C. §§ 1 et seq.,<sup>1</sup> against two labor unions, the American Federation of Musicians of the United States and Canada (AFL-CIO), its New York affiliate, Associated Musicians of Greater New York, Local 802, and their officers.<sup>2</sup> The plaintiffs presently in the case are four professional musicians, each of whom was a member of Local 802 and the Federation at the time the suit began.<sup>3</sup> The unions represent professional musicians on all forms of musical engagements. In the music industry, the distinction is sometimes made between single engagements, which are engagements gen-

---

<sup>1</sup> The joint appendix printed for this court will be referred to by the designation "App." followed by an arabic numeral (e.g., App. 102).

The numbered volumes of the appendix to plaintiffs' brief in the court below (large white volumes) will be referred to by the designation "App." followed by a roman numeral and an arabic numeral (e.g. App. I-101).

Appendix to defendants' brief in the court below (blue volume) will be referred to by the designation "App." followed by an arabic numeral with the suffix b (e.g. 353b).

The references in the District Court's Findings of Fact are to the stenographer's minutes of the trial. Quoting those findings in this brief, we shall omit those references and references to the exhibits.

<sup>2</sup> The District Court found there is no evidence that any of the officer defendants committed, as individuals, any of the acts complained of. (Finding No. 22, App. 128). For this reason, we shall use the term "defendant" herein as referring solely to the defendant unions.

<sup>3</sup> Subsequently, plaintiffs Peterson and Carroll were expelled from the Federation for reasons unrelated to this lawsuit. See Findings 4 and 5 of the District Court (App. 125-126).

erally for one day, but always for less than one week, and all others which are known as steady engagements. (Finding 24, App. 128). While the trial in this case covered other areas of the music industry as well, the practices challenged by plaintiff are mainly in what is known as "club date" engagements, which are social engagements such as weddings, confirmations, and commencements. (Finding 25, App. 128-129). Normally, the purchaser of the music (the father of the bride, organizational social chairman, etc.) approaches a musician with a request for a specified number of instrumentalists at a particular time and place. This musician thereby becomes the "leader", who obtains the other musicians who perform the engagement. (App. 186). When the leader performs himself, he conducts the musicians and usually also plays an instrument. (Finding 43, App. 132). When the leader does not perform the engagement himself, the identical leading functions are fulfilled by a subleader (Finding 36, App. 131), and his instrument is played by the subleader or a sideman (Finding 45, App. 132). The plaintiffs are primarily orchestra leaders in the "club date" field, although all have performed from time to time in other areas of the music industry.

The trial court identified the various activities of defendant unions which were the subject of plaintiff-leaders' antitrust charges as follows: (App. 160:)

"(1) pressuring orchestra leaders into the union;

"(2) imposing minimum price regulations on orchestra leaders;

"(3) imposing minimum numbers of sidemen requirements on orchestra leaders;

- "(4) requiring the use of the Form B Contract;
- "(5) imposing restrictions on traveling orchestras;
- "(6) failing to bargain collectively;
- "(7) regulating booking agents and caterers;
- "(8) monopolizing the music industry."

We shall first set forth the facts relating to each of the above charges and shall then describe more generally employment relationships in the musical field. Except as expressly noted, our statement will be based on the undisturbed findings of the District Court.

### **THE FACTS**

#### **A. Employment Relationships in the Music Industry**

##### **1. Music Industry Generally**

Members of the unions perform services as orchestra leaders, subleaders and sidemen on club dates and for hotels, restaurants, night clubs, recording companies, broadcasting companies, theatres, steamships, operatic and philharmonic societies (Finding 26; App. 129). Musicians do not confine their activities to any one musical field. They seek engagements wherever job opportunities exist (Finding 29; App. 129-130).

"Thus, musicians who perform services as orchestra leaders, subleaders and sidemen in the club date field also perform services in non-club date field. \* \* \* Conversely, musicians who perform in the non-club date fields also work as leaders, subleaders, or sidemen in the club date field when they are not otherwise engaged".

## 2. Interrelationship Between Leaders and Sidemen

Leaders, other than Peterson, when they personally appear at engagements invariably play musical instruments (Finding 43; App. 132). Thus Cutler plays the saxophone and Carroll the drums (Finding 42; App. 132). The leaders' witnesses testified that an orchestra leader, in playing an instrument, fills a requirement for an instrument in the orchestra just as any sideman does (Finding 44; App. 132). Based upon this undisputed testimony confirmed by the witnesses of plaintiff leaders, the District Court found (Finding 45; App. 132):

"Each time plaintiffs play instruments in the hotel steady or club date field they displace the services of a sideman who otherwise would have been engaged to play the same instrument that the particular plaintiff played."

Plaintiffs concede that sidemen are employees (Finding 40; App. 131). Thus, in playing instruments leaders perform functions identical with those of acknowledged employees—sidemen—who are also union members.

## 3. Interrelationship Between Leaders and Subleaders

Plaintiffs regularly use subleaders for their engagements. They do so when they accept simultaneous engagements for more than one orchestra. The subleader performs all the musical services which the leader would have performed had he been present (Finding 36; App. 131).<sup>4</sup> Sub-leaders are admittedly employees (Finding 37; App. 131).

<sup>4</sup> Thus Cutler testified (App. 373b):

"Q. You mentioned before that you have certain employees whom you use as sub-leaders. What is the function or role of a sub-leader in an engagement? A. Obviously someone

Plaintiffs and their own witnesses testified that when an orchestra leader personally conducts an orchestra he displaces the services of a subleader who would otherwise have been engaged to conduct the orchestra. (App. I-305-06, 351-52, III-757-60, 829, 66b, 70b, 78b-79b, 81b, 82b, 373b-374b). On the bases of this and other evidence, the District Court found (Finding 38; App. 131):

“Each time plaintiffs personally conduct an orchestra in the hotel steady and club date fields, they displace the services of a subleader who would otherwise have been engaged to conduct the orchestra.”

The uncontradicted evidence also showed that plaintiff “Levitt actually did lead a band at a steady engagement at a dance hall for which he received less than the subleader’s union minimum wage” (App. 164). Judge Levett referred to the wage cutting by Levitt after observing (App. 164) that “if they [leaders] undercut the union wage scale or do not adhere to union regulations regarding hours or other working conditions when they perform, they will undermine these union standards.”

#### **4. Interrelationship Between Leaders and Sidemen Who Occasionally Lead in the Club Date Field**

There is a high degree of interchangeability in work functions among orchestra leaders, subleaders and

---

has to be in charge, someone has to call the tune, someone has to be responsible, someone has to contact the purchaser of the music and get his wishes and find out where the musicians are to stand or play, whether they will be fed and all those things, and then he stands there as a part of the orchestra and he calls out the tunes that are to be played and he tells them in what tempo they are to be in. *He exercises all the functions I would exercise if I were there*” (emphasis supplied).



sidemen in the club date single engagement field. On the same day or during the same week, a musician may act as a leader, subleader or sideman at different engagements (App. 384b, 393b, 395b-396b). For example, 50.3% of all members of Local 802 who performed services as sidemen in the club date field during the month of December 1961 also acted as orchestra leaders in the club date field during the year 1961 (Ex. K; App. 398b). Again, 50% of plaintiff Levitt's sidemen acted as orchestra leaders during 1960-64 (Exc. DM, LR; App. 491b). In fact, the vast majority of Local 802's members who act as orchestra leaders do so only occasionally; they are primarily sidemen.

#### **5. The Status of Leaders as Employers or Employees**

One of the most thoroughly litigated issues at the trial was the employment status of leaders. It was the defendant unions' position that orchestra leaders are not employers, but are rather the employees of the purchaser of the music. Plaintiffs contended that they, and leaders who operate as they do, are employers. They did not contend that *all* leaders are employers until after trial; indeed, they stipulated that "Conducting is a musical service and orchestra leaders when conducting, perform the same type of work whether they are 'employers' (for any purpose) or 'employees'". (Finding 32; App. 130).

The evidence at trial dealt with the employment relationships in the club date field, at hotels, restaurants and night clubs, and in radio and television broadcasting and recordings. The trial court made elaborate findings regarding the employment relationships in broadcasting and recording and determined therefrom that the leader is the employee of the broadcasting and

recording companies. He deemed it unnecessary to make findings or draw conclusions regarding the leaders' status in the club date field or on steady engagements in hotels, restaurants and night clubs (App. 163).

### **B. The Union Activities and Regulations Attacked by Plaintiff-Leaders**

There is no evidence that the challenged activities were part of a conspiracy to create a business monopoly or to control the marketing of goods or services. On the contrary, there were findings by the trial court (App. 167, 170-171) and affirmative proof that the unions acted independently in their self-interest to prevent destruction of minimum wages, working conditions, and terms and conditions of employment of their members.

#### **1. The Alleged Pressuring of Orchestra Leaders Into the Unions**

In the non-club date field the collective agreements negotiated by the unions contain union shop provisions similar to those contained in thousands of collective agreements made by International and local unions in accordance with the provisions of Section 8(a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(3). In the club date field, where there are no collective agreements, the unions do not permit members to play in the same orchestras with nonmembers (Finding 127; App. 156). However, in the case of leaders Carroll and Peterson, who were expelled from the union, the unions permit members to perform for them so long as Carroll or Peterson do not conduct or play an instrument. Judge Levet found that when they so operate "the union does not significantly hinder them from carrying on their business in this fashion

[and] [i]nsofar as they do not themselves conduct or play the charge of pressuring them into the union has not been sustained." (App. 168).

## 2. Imposing Minimum Price Regulations on Orchestra Leaders

Local 802 and other AFM locals set minimum wages for the sidemen and leader. (Finding 74, 80; App. 140-141, 142). Local 802 requires the leader to charge the purchaser the aggregate of the minimum compensation established for sidemen and leaders.<sup>5</sup> (Finding 79; App. 142). The same minimum prices must be received by employer-leaders and employee-leaders alike (Findings 74, 75; App. 140-1).

The minimum wages which must be paid to sidemen vary with a number of factors, including "the type of engagement involved; the number of hours played; whether the sideman plays more than one instrument," etc. (Finding 73; App. 140). Sidemen must also receive expenses for food, lodging, clothing, travel, etc. (App. I-65-66; Ex. CI, p. 24-25).

Each orchestra leader must receive as his minimum scale compensation a basic fee which will vary from 25% to 100% above the wages payable to sidemen, depending upon the number of musicians playing the engagement (Finding 74; App. 140-141). The orchestra leader must also be paid as part of his minimum scale compensation on club dates a sum equal to 8% (it was initially fixed at 7%) of the scale wages of the

<sup>5</sup> Local 802's minimum wages and minimum prices in the club date field are established either by the members of Local 802 at a so-called Price List Meeting, or, if a quorum of members is not present, then by Local 802's Executive Board pursuant to a standing resolution in the bylaws granting them such authority. (Finding 81; App. 142-143).

leader and the sidemen. The purpose of the 8% is to reimburse the orchestra leader for his out-of-pocket expenses for social security, unemployment insurance and bookkeeping (Stipulated Facts 21, 22, 23; App. 105-106).<sup>6</sup>

Where the leader does not himself perform but uses a subleader, he must pay the subleader out of his compensation, a minimum wage which will vary from  $1\frac{1}{8}$  times to double the sidemen's scale depending upon the number of men in the orchestra and whether or not there is a rehearsal or show (Stipulated Facts 24, 25, 26; App. 106-107).

The testimony of a number of witnesses (including witnesses called by appellants) was that when a leader receives less than union scale from the purchaser, the sidemen invariably receive less than scale wages (App. IV-1198-1199; 44b, 60b-61b; 245b). There is thus a direct relationship between the price charged the purchaser and the minimum wages received by musicians. It was in view of this relationship between prices and minimum wages that Judge Levet observed (App. 168-169):

"Any cuts by participating leaders of their fees below union minimums or in the price of an engagement below a union minimum equalling the total minimums of the participants put an obvious downward pressure on the wages of subleaders and sidemen."

---

<sup>6</sup> At the time the percentage was 7% a pamphlet issued by Local 802 in 1949 set forth the "reasons why orchestra leaders are required to receive the aforementioned additional sum of 7%, now 8%, of sale" (Stipulated Fact 22; App. 105). The percentage was increased to 8% because of the increase in social security taxes (Ex. DE, pp. 39, 76).

### **3. The Requirement That Leaders Use a Minimum Number of Musicians**

The unions have been continuously faced with acute unemployment. Since 1951 Local 802 has required the employment of a minimum number of musicians on club dates performed in various ballrooms in the City of New York (Finding 84; App. 143-144). These regulations were adopted after complaints were made by members that the number of musicians employed on club dates was being inordinately reduced and that there were occasions on which as few as three musicians would perform for affairs at which two or three thousand people were present (App. 315b-317b). They are challenged here by plaintiff.<sup>7</sup>

### **4. Federation Regulations Requiring the Use of the Form B Contract**

AFM does not allow its members "to sign any form of contract or agreement for an engagement other than that issued by the A.F. of M." (Finding 86; App. 144). This contract is known as the Form B contract. It designates the purchaser of the music as the employer, and vests in him the right to control the services of the musicians (App. 19).

---

<sup>7</sup> Local 802 has also obtained additional employment for musicians by persuading the City of New York to sponsor live musical programs at parks, schools and hospitals at a cost to the City of approximately \$50,000 to \$80,000 per annum (App. II-661-64). Defendants have also sought to stabilize employment by entering into collective agreements with television networks, Radio City Music Hall, the New York Philharmonic-Symphony Society, the Metropolitan Opera Association, and certain legitimate theatres which specify the minimum number of musicians to be employed (Exs. BL1-4, CH, BS, and CB). AFM has also secured the employment of additional musicians by providing in collective agreements with recording companies and motion picture producers for the payment of sums aggregating approximately \$5 million per year into a Music Performance Trust Fund used to furnish live music for various public and charitable functions (Exs. FQ, FG).



The Federation's by-laws provide that before each engagement the leader must submit the contract to the local in whose jurisdiction the engagement is being played, or in its absence a written statement defining the conditions under which it is to be performed, including *inter alia* the amount contracted for, the names of the individual sidemen, and the amount of money paid each of them. (Finding 86; App. 145).

#### 5. Restrictions on Traveling Musicians

For many years, the by-laws of the Federation have required that there be a higher wage on traveling engagements. Article 15 of the bylaws provides as to traveling engagements that the "minimum wage to be charged and received by any member" shall be "no less than either the wage scale of the local in whose jurisdiction the services are rendered or the wage scale of the home local of the member performing such services, whichever is greater, plus 10% of the wage scale of the local in whose jurisdiction the engagement takes place. (Finding 99; App. 146-147).

Judge Levet found (Finding 100; App. 147), and the undisputed evidence showed (App. IV-1356-57, 1367-68) that:

"The purpose of the traveling engagement wage differential is to protect work opportunities for local musicians within their respective local union jurisdictions."

Federation's by-laws also restrict the right of traveling members to solicit engagements outside of their home locals. These restrictions are set forth in Findings 105-114 (App. 148-150) of the District Court to which we respectfully refer this Court.

#### **6. The Alleged Failure to Bargain Collectively**

The unions do not bargain with leaders or users of music in the club date single engagement field (Finding 123; App. 153). They do bargain in the non-club date fields. (Finding 124; App. 153). Those employers with whom they have collective agreements include, among others, phonograph recording companies, radio and television broadcasters, television film producers, television videotape producers, motion picture producers, television videotape producers, motion picture producers, nontheatrical, documentary and industrial film producers, electrical transcription producers, theatres, steamship companies, Radio City Music Hall, Metropolitan Opera Association, Philharmonic-Symphony Society of New York, New York City Opera, New York City Ballet, hotels, restaurants, and ball-rooms (Finding 124; App. 153).

#### **7. Regulating Booking Agents and Caterers**

##### *(a) Booking Agents*

The intense competition for jobs among musicians during the depression gave rise to a number of abuses by booking agents, who secure engagements and contracts for musicians. In particular, many booking agents charged exorbitant fees and frequently booked engagements below union scale (Finding 118; App. 151). The situation was described in the President's Report at the Federation's 1936 Convention.

Following that report, the Convention adopted a resolution requiring all booking agents to enter into standard forms of license agreement under which the agent agreed not to charge more than a 10% commission on steady engagements, or more than a 15% com-

mission on single engagements, not to book non-union musicians, and not to book orchestras for less than union scale wages or working conditions.<sup>8</sup> No charge is made for the license. (Finding 116-119; App. 150-151)

Subsequent to the adoption of the regulations governing booking agents, the abuses were, to a large extent, eliminated. (Finding 119; App. 151).

### (b) *Caterers*

Many engagements in the club date field take place in catering halls which are rented by purchasers of music. The catering halls furnish food and drink but as a rule do not supply orchestras. However, some proprietors of catering halls recommend particular orchestras to prospective purchasers (Finding 120; App. 151).

For the past 15 years a standing resolution in Local 802's bylaws has provided (Finding 121; App. 152):

"A. Caterers, banquet managers and others connected directly or indirectly with halls, hotels and all similar establishments which provide facilities for public or private functions, are prohibited from engaging leaders or musicians, for such affairs.

\* \* \*

"C. The payment or promise of payment, or any gift or consideration whatever, to the above is

---

<sup>8</sup> Similar license agreements are utilized by many other unions in the entertainment field, such as the American Guild of Variety Artists, the American Federation of Television and Radio Artists, Actors Equity, and the Writers Guild (App. I-195-96, 16b-17b, 62b).

contrary to the principle of fair competition among members of this local, and any member guilty of such offense shall be fined not more than Five Hundred Dollars (\$500.00) or suspended, or both."

The resolution was adopted after an extensive investigation of abuses by caterers. One of the reports of the investigating committee stated (Finding 122; App. 152-153):

"The objective of this committee's important assignment can be stated simply: the elimination of the caterer from the music business and the restoration to the musician of his right to earn a living without any restrictions and pressures upon him. Your committee believes, and knows that in that belief it reflects the unanimous opinion of the membership, that all money spent for music should go to musicians and not to chisellers. We oppose any caterer booking orchestras because that obviously leads to a depressing of union scales. The caterer must be barred from compelling people to use a specific orchestra."

Based upon the foregoing undisputed evidence the trial court found (App. 175):

"The evidence discloses that caterers took advantage of their position before the union adopted its regulations to, in effect, book orchestras and they continue to do so, at least to some extent. Caterers recommend orchestras to customers and receive commissions from orchestra leaders. These practices actually or potentially affect the wages of the musicians involved."

## THE PROCEEDINGS BELOW

## 1. The District Court

This case arises out of two separate complaints under the antitrust laws filed on July 29, 1960 and December 15, 1960 respectively. Of the original plaintiffs only Joseph Carroll and Charles Peterson remain in the case; two others, Ben Cutler and Marty Levitt were allowed to intervene before trial. The complaint alleged that the suit was brought as a class action under rule 23 of the Federal Rules of Civil Procedure, but the District Court ultimately rejected that claim and treated the action "as affecting only the actual parties". (App. 160).<sup>10</sup>

Following a lengthy trial, the District Court on May 17, 1965, issued its decision dismissing the complaint in its entirety. The Court made comprehensive findings carefully annotated to the transcript of the trial record and the stipulations of the parties.

The Court introduced its discussion of the antitrust issues by pointing out that under *Allen Bradley Co. v. Local 3, I.B.E.W.*, 325 U.S. 797, the "unions could not, 'consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services'. *Id.* at 808". (App. 161). It then examined prior decisions of this Court to determine the meaning of the term "non-labor group" and concluded that the criterion used in the decisions "was the presence of job or wage competition or some other economic interrelationship affecting

---

<sup>10</sup> On May 22, 1961, the complaints were consolidated and joined with two other cases (not arising under the antitrust laws) brought by the original plaintiffs. However, by stipulation, the issues in the other two cases were tried first and the record there made incorporated in this case.



legitimate union interest between the union members and the independent contractors". (App. 162). The trial judge noted that if such economic relationships existed "the independent contractors were a 'labor group' and party to a labor dispute under the Norris-LaGuardia Act." (App. 162).

Thus, in the District Court's view:

"The ultimate issue in determining whether a relationship exists which would exempt conduct complained of from the Sherman Act is whether the work functions performed by the independent contractors actually or potentially affect the hours, wages, job security or working conditions of the union members in the same industry. If so, the union may combine with the independent contractors by including them in the union and subjecting them to union regulation." *Lqs Angeles Meat Drivers Union v. United States*, *supra*; *United States v. Fish Smokers Trade Council, Inc.*, *supra* at 234. (App. 162).

Finding that the leaders were in competition with employee members of the union regarding jobs, wages and other working conditions, he concluded that they comprised a labor group. (App. 163). On the basis of those findings of job and wage competition, the trial judge determined that, under *Meat Drivers v. United States*, 371 U.S. 94 and *Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91, it was lawful to compel them to join the unions. (App. 168). Turning his attention to the legality of the price lists, he concluded that, "In view of the competition between leaders and sidemen and subleaders which underlies the finding that the leaders are a labor group, the union has a legitimate interest in fixing minimum fees for a participating leader and minimum engagement prices

equal to the total minimum wages of the sidemen and the participating leader." (App. 168). Finally, finding no evidence in the record to indicate that the price lists were established as part of a conspiracy with "non-labor groups to create business monopolies and control the marketing of goods and services", he declared *Allen Bradley Co. v. Local 3, I.B.E.W.*, 325 U.S. 797 to be inapplicable. (App. 170-171).

The District Court also considered and rejected plaintiffs' allegations that defendants violated the Sherman Act by refusing to bargain collectively, imposing minimum employment quotas for certain engagements, requiring leaders to use the Form B contract, and, regulating booking agents and caterers. (App. 171-177).

## 2. The Court of Appeals

Although plaintiff-leaders challenged some of the District Court's findings of fact, the Court of Appeals did not express disagreement with any of them.<sup>11</sup> With a single exception, which is the subject of Case No. 309, the Court affirmed the dismissal of the complaint.

Of particular significance is the Court's rejection of the leaders' contention that they could not be required to be union members:

"Even those orchestra leaders who, as employers in club dates, lead but never perform as players,

<sup>11</sup> There are, however, two or three statements of fact in the Court of Appeals' opinion which are not based on the findings and which are contrary to the record. One of these, which the Court of Appeals thought to be material, is described at p. 53, *infra*. The Court of Appeals stated that most leaders employ booking agents. This simply is not so. Nor does the union operate a hiring hall.

are proper subjects for membership because they are in job competition with union subleaders; each time a non-union orchestra leader performs, he displaces a 'union job' with a 'non-union job.'" (App. 202)

Similarly, the Court found where the leader performs,

"... the services of a sub-leader would not be required and the leader may in this way save the wages he would otherwise have to pay. Consequently, he could make the services of his orchestra available at a lower price than could a non-performing leader." (App. 199).

However, the Court held that it was unlawful for the unions to fix the minimum price which the leader must charge to the purchaser of the music in the club-date field even where the leader performs. It agreed with the District Court that the unions had not conspired with a non-labor group to fix prices, and thus rejected the leaders' principal contention—that the unions' conduct came within *Allen Bradley Co. v. Local 3, I.B.E.W.*, 325 U.S. 797, and *Mine Workers v. Pennington*, 381 U.S. 657. (App. 195). However, the Court decided that the price regulations were invalid under *Meat Cutters v. Jewel Tea*, 381 U.S. 676.

It noted that here "the unions' protective provisions do not, as in *Jewel*, appear in agreement with employers" (App. 196), but are instead adopted unilaterally by the unions. But it held that *Jewel* applied nonetheless because the "policy considerations are, however, the same" (*Id.*). It was the majority's view that *Jewel Tea* held an agreement is protected by the labor exemption to the antitrust laws only if it deals with a mandatory subject of bargaining. On that assumption,

and bearing heavily on the fact that petitioners' regulations governed "prices", the Court held that they did not deal with a mandatory bargaining subject but rather constituted price-fixing, and were a *per se* violation of the Sherman Act.

Judge Friendly dissented, saying *inter alia* that it "would be a serious misunderstanding" to read *Jewel* as holding that only union agreements on mandatory subjects of bargaining are exempt from the antitrust laws. "Where, as here, the union rule merely sets a floor under the price at which one union member may sell his services to customers in competition with other, the union needs no special justification as it did in *Jewel Tea* for regulating what would ordinarily be management prerogatives of independent business men employing union members." (App. 206).

## SUMMARY OF ARGUMENT

### I

Both courts below found the protesting orchestra-leaders to be in job and wage competition with employee-musicians. Under the consistent holdings of this Court, the existence of such competition is the "crucial determinant" of the legality of union attempts to regulate the competitive activities of such orchestra leaders be they considered employers or independent contractors. Since the economic objective of the unions in the present case was to control this job and wage competition by the leaders, the unions' activities did not violate the antitrust laws.

This Court has considered union regulations of working employers in many different contexts. Whatever the context, however, the Court has predicated its conclusions on the ultimate economic reality underlying the union's conduct. Whether the question before



the Court was the applicability of antitrust sanctions to union picketing aimed at ending the vendor system, *Milk Wagon Drivers', etc. v. Lake Valley Farm Products*, 311 U.S. 91, the scope of the preemption doctrine in a state antitrust action attacking a collective bargaining provision that required the payment of a fair rental to owner-operators, *Teamsters Union v. Oliver*, 358 U.S. 283, or the effect of the Norris-La Guardia Act on a lower court's order that a union expel a group of grease peddlers from membership, *Meat Drivers' v. U.S.*, 371 U.S. 94, this Court has probed the ultimate economic objective of the unions' actions. Invariably this Court has determined legality or illegality on the basis of whether there was job and wage competition from working employers.

In the recent decision of *Meat Cutters v. Jewel Tea*, 381 U.S. 676, the method of analysis consistently utilized in the independent contractor cases (which were cited and relied upon) was applied to the more general problem of determining when a union agreement with non-labor groups qualifies for the labor exemption. In holding that a collective bargaining agreement that restricted marketing hours was intimately related to wages, hours and working conditions and therefore within the labor exemption, this Court looked to the underlying factual predicate for the union's contentions that such restrictions were necessary to protect the working conditions of its members. As in *Jewel Tea*, the legality of the unions' conduct here hinges, in the final analysis, on the factual support for the unions' contentions that the regulations are necessary to protect the job standards of their employee-members. And, as in *Jewel Tea*, the factual findings support those union contentions.



This Court declared in *Jewel* that, "(t)he crucial determinant is not the form of the agreement—e.g. prices or wages—but its relative impact on the product market and the interests of union members." 381 U.S. 676, 690, n. 5. Yet the Court of Appeals here placed ultimate reliance on the "form" of the unions' actions—"price-fixing"—and ignored their impact—the loss of jobs and the reduction of wages. In so doing, it abandoned the search for economic reality that has been the hallmark of this Court's decisions and condemned union activities that this Court has specifically approved.

The union activities here involved are identical to those in *Oliver*. And the Court of Appeals here, like the Ohio courts in *Oliver*, failed to recognize that the unions must fix the minimum price for the total contribution made by the competing working employer in order to effectively preserve the working conditions of its employee members. For the union's wage scale will mean nothing if the employer who does the same work as his employee absorbs the cost of any part of that contribution. The "form" of the unions' regulations therefore can be no more controlling here than it was in *Oliver*.

If the economic predicates for the unions' conduct are appreciated, the legality of that conduct under the antitrust laws is clear under each of the various methods for appraising union conduct that this Court has utilized;

(1). In *Apex Hosiery v. Leader*, 310 U.S. 469, this Court held that union elimination of "price competition based on differences in labor standards" does not violate the antitrust laws. Here the union, in preventing the leader from reducing his price below the

sum of his own scale wages and all other expenses, is eliminating "price standards based on differences in labor standards." The reasoning of the court below is in sharp contrast to its expressed approval of the right of the unions to compel the leaders into membership because they were in job and wage competition with employee musicians. Since the legitimacy of the unions' interest in compelling the leaders into membership is based on the need to regulate their competition, that holding is irreconcilable with the Court of Appeals' conclusion that the union may not prescribe the minimum which the leader must receive.

(2) Similarly, the existence of job and wage competition compels the conclusion that the unions have not violated the antitrust laws because they have not combined with a non-labor group. Since this Court's historic decision in *United States v. Hutcheson*, 312 U.S. 219, it has been clear that the antitrust laws do not apply "(s)o long as a union acts in its self-interest and does not combine with non-labor groups. . . ." 312 U.S. at 232. The Court of Appeals agreed with the District Court's conclusion, based on its findings of job and wage competition, that the unions here had not combined with a non-labor group. Ignoring the significance of the fact that the unions in *Jewel Tea v. Meat Cutters*, *supra*, had combined with a business enterprise (patently a non-labor group), it believed, however, that *Jewel Tea* established a "narrower ground on which the unions' activities must be tested", even where the union acts unilaterally. In so doing, it failed to follow the undisturbed holdings of this Court that a union does not violate the antitrust laws where it acts alone and not in combination with business groups.

(3) Finally, since the union provisions regulating the job and wage competition of the leaders deal with a

mandatory bargaining subject, they are immunized from antitrust liability for that reason as well. In *Teamsters Union v. Oliver, supra*, this Court held that union actions indistinguishable from those of the unions in this case dealt with a mandatory subject of bargaining. The Court of Appeals assigned no persuasive reason for its failure to follow *Oliver* but contented itself with the unsupportable *ipse dixit* that the situations were not "at all comparable". Moreover, in stating that there was no authority holding that an employer must bargain on a union's demand that he not perform the work of an employee, the Court of Appeals overlooked a decision of the National Labor Relations Board precisely in point. *Crown Coach Corp.*, 155 NLRB 625, 628. The majority's error lay, however, not in its overlooking a Labor Board decision, but in its failure to grasp the essence of this Court's decision in *Oliver*—that whether a provision deals with a mandatory bargaining subject depends upon its impact on employee standards. Since this Court and the Labor Board have both declared varying union methods to protect jobs direct labor concerns, both logic and policy reject the notion that a union's effort to regulate the job and wage competition of working employers is not a mandatory subject of bargaining.

## II

Where the leader does not perform, union establishment of a minimum price for the engagement raises a different and concededly more troublesome issue. However, the record evidence demonstrated and the District Court found that "... skimping on the part of the person who sets up the engagement so that his costs are not covered is likely to have an adverse effect on

the fees paid to the participating musicians." Because of the singular nature of employment relationships in this field, there is a direct, rather than an indirect, relation between the price received and the wages paid to the employees. Moreover, the selection of the musicians who will perform is itself a musical service for which the union may insist that the leader receive remuneration. Indeed, it is in recognition of this fact that the leader receives additional compensation in those fields in which he is clearly an employee. For these reasons, union regulation of the amount the leader charges, even where he does not perform, is immunized from the antitrust laws by reason of the labor exemption.

### III

The various practices challenged in No. 310 are lawful and the courts below were clearly correct in sustaining their legality. Since leaders are in job and wage competition with employee musicians, it is lawful for the unions to admit them to membership and even to compel them to be members. *Meat Drivers v. United States, supra*; *Milk Wagon Drivers v. Lake Valley Farm Products*, 311 U.S. 91. The provisions of § 8(b) (4)(A) of the National Labor Relations Act cannot affect the legality of these practices under the antitrust laws. The unions' insistence on a closed shop concerns a "term or condition of employment" and is therefore exempt from the antitrust laws. *United States v. American Federation of Musicians*, 318 U.S. 741, affirming 47 F.Supp. 304 (N.D. Ill.). Establishment of minimum employment quotas, since intended to enhance job opportunities, likewise comes within the labor exemption to the antitrust laws. *United States v. American Federation of Musicians, supra*; *United States v. Car-*

*rozso*, 37 F. Supp. 191 (N.D. Ill.), *affirmed*, 313 U.S. 539. The unions' refusal to bargain is not the kind of conduct condemned by the antitrust laws and this Court's decision in *Hunt v. Crumboch*, 325 U.S. 821, forecloses plaintiffs' claims. Similarly, the unions' insistence on the use of a form contract simply has nothing to do with the antitrust laws and is a legitimate union requirement. Nor can antitrust liability attach to the unions' attempts to favor the employment of local musicians rather than musicians from outside the jurisdiction. Union protection of local jobs has been a traditional and legitimate concern consistently approved by the courts. Finally, the unions' regulation of booking agents is, as the District Court found, "reasonably related to their interest in maintaining observance of union scale wages and working condition." Indeed, the activities of the booking agents are identical to those performed by unions in other industries and are subject to union rules for that reason.

## ARGUMENT

### Introduction

This Court has dealt, in a variety of contexts, with the attempts of labor unions to control the activities of independent contractors. Regardless of the manner in which the case arose, however, the Court has always searched for and grounded its decision on the economic objectives and consequences of the union's conduct. If the underlying facts demonstrated that the union activities were designed to protect employee standards from the unfair competition of working employers, the union's conduct has consistently been approved. Whatever the legal or statutory formulation, the basic answer given by this Court has been and remains the



same—a union may seek to regulate job and wage competition by working employers.

Here the protesting orchestra leaders have mounted a blunderbuss attack on long-standing practices by which the American Federation of Musicians and Local 802 have sought to do precisely what this Court has said they could do, i.e., attempt to preserve the job opportunities and wage standards of their members and to preclude unfair competition by working employers. Claiming that they are the employers of musicians on club-date engagements, these particular orchestra leaders have contended that the union regulations which affect them in their status as employers violate the antitrust laws. The District Court correctly directed its inquiry to whether these leaders were in job and wage competition with employee musicians; and having found that such competition existed and having found that the union regulations were legitimately directed toward regulating that competition, the court dismissed the complaints in their entirety. But the Court of Appeals for the Second Circuit, while reaffirming the findings of job and wage competition, invalidated those regulations establishing the minimum compensation of the leaders on club-date engagements. In ignoring its own findings of job and wage competition and predicated its findings of illegality on the label "price-fixing", the Court of Appeals abandoned the search for economic reality that has been the hallmark of this Court's decisions and condemned union activities this Court has explicitly approved.

In its most recent decision concerning the scope of the labor exemption from the antitrust laws, this Court declared that the "crucial determinant" is not the form but the relative impact of the union's actions. *Meat*

*Cutters v. Jewel Tea*, 381, U.S. 676. We shall show first that it was precisely because of its undiscerning reliance upon the form of the union activities involved here that the Second Circuit misapplied the precedents of this Court. And, we shall show, once the economic impetus for the unions' actions—the existence of job and wage competition—is fully comprehended, the decision of the Court below is clearly incorrect under each of the various legal theories this Court has relied upon in assessing the breadth of union antitrust liability. In other words, where a union in fact seeks to ward off unfair competition by working employers, its actions are immunized from antitrust liability because (1) a union may eliminate price competition based on differences in labor standards or (2) because a union may lawfully combine with members of a labor group or (3) because a union demand that a working employer receive a stated minimum is a mandatory subject of bargaining.

The unions' other practices were sustained by the Court of Appeals. To the extent that the plaintiff leaders renew their challenge in this Court, we shall discuss these also;<sup>12</sup> as their legality rests in large part on the same principles as those involved in the basic discussion, or is obvious for other reasons, it will be possible for us to deal with them in fairly short order.

---

<sup>12</sup> Plaintiffs' petition for certiorari in No. 310 raises twenty-seven Questions Presented. Many of these are argumentative or raise matters which were not litigated or decided below. It will therefore lend itself to more orderly and intelligible presentation of the matters which are properly here for consideration to follow the opinion of the Court of Appeals and discuss separately the various practices which that Court considered and held lawful. Those issues which are encompassed by the questions presented but which were not decided by the Court of Appeals, are not properly before the Court and the writ of certiorari should be dismissed to that extent. See, e.g., *Mishkin v. New York*, 383 U.S. 502, 513-514.

# **I. THE UNIONS MAY LAWFULLY REGULATE THE LEADER'S MINIMUM INCOME WHEN HE PERFORMS**

## **A. The "Crucial Determinant" is the Job and Wage Competition Between Leaders and Employee-Musicians.**

When the leader performs a club-date engagement, he is a working musician. Usually he performs an instrument; but even when he only conducts he is performing a musical service. (App. 130) A musician who is the leader on one engagement is more likely than not to be a subleader or only an instrumentalist on the next engagement. (App. 130-131) Even those leaders who may now not act as sidemen began their careers as instrumentalists. Musicians who perform club-dates also compete for engagements in other fields of the music industry, in many of which the leader, though performing the same musical function, is unquestionably an employee. (App. 129) For all these reasons, leaders have from the start been members of the American Federation of Musicians and its locals. Their membership is thus not an artificial or convenient contrivance to shield a group of businessmen from antitrust liability; rather it is the natural association of members of a common calling, who are in constant job and wage competition with each other.

The fundamental purpose of unionism is to regulate such competition among workers, *American Steel Foundries v. Tri-City Trades Council*, 257 U.S. 184, 209. Such competition is not abated merely because some of the competing workers may also be regarded as independent businessmen or as the employers of the other workers. Since the leader is clearly in job and wage competition with employee-musicians, the union must regulate his activities. A job sought by a non-leader violinist at wages fixed by the union would only rarely withstand the competition by a

leader who is free to play the violin without charging for his services. As the District Court found (App. 168):

In view of the competition between leaders and sidemen and subleaders which underlies the finding that the leaders are a labor group, the union has a legitimate interest in fixing minimum fees for a participating leader and minimum engagement prices equal to the total minimum wages of the sidemen and the participating leader. Any cuts by participating leaders of their fees below union minimums or in the price of an engagement below a union minimum equaling the total minimums of the participants puts an obvious downward pressure on the wages of subleaders and sidemen.

It is that competition for jobs which prompts the union, as a matter of economic necessity, to regulate the wages of the working leader; and such regulation is effective only by establishing the minimum price at which the leader may sell his and his sidemen's services.

And it is the presence or absence of such legitimate economic concerns that this Court has looked in its review of union activities regarding independent contractors. Regardless of the precise legal posture of the case, the union's actions have been examined, traditionally and consistently, in the light of the economic realities. Where, as here, the union has sought to protect the job and wage standards of its members from competition by working employers, this Court has held the union's conduct lawful.

The problem first arose in this Court in *Senn v. Tile Layers' Union*, 301 U.S. 468. There a union picketed an employer to require him to sign a union contract,



which he refused to do because it would have required him to cease working at the trade in his own shop. The Wisconsin courts, holding this to be a labor dispute under the Wisconsin labor code, refused to enjoin the picketing. Though the precise holding of this Court was therefore quite narrow (that Wisconsin had not denied the employer due process of law) Justice Brandeis significantly said for this Court (301 U.S. at 481):

The unions acted, and had the right to act as they did, to protect the interests of their members against the harmful effect upon them of Senn's action. Compare *American Steel Foundries v. Tri-City Central Trades Council*, *supra*, 257 U.S. 184, 208, 209.

Similarly in *Milk Wagon Drivers' etc. v. Lake Valley Farm Products*, 311 U.S. 91, this Court looked to the economic motivation of the union's actions to determine whether there was a "labor dispute" under the Norris-LaGuardia Act. Drivers employed by dairies under union contracts had lost their jobs because their employers were being undersold by other dairies who sold milk to independent vendors who owned and operated their own trucks and in turn sold the milk to previous customers of the union dairies. The union believed that the dairies who used the vendor system were able to sell milk at lower prices than the union dairies because "the vendors worked long hours, under unfavorable working conditions, without vacations, and with very low earnings." 311 U.S. 95. Accordingly, it picketed and engaged in other activities to force the vendors into their union, where they would be forbidden to handle the milk as vendors. This Court unanimously held the controversy to be a "labor dis-



pute" within the meaning of the Norris-LaGuardia Act, holding:

Whether rightly or wrongly, the defendant union believes that the "vendor system" was a scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards. To say, as the Circuit Court of Appeals did, that the conflict here is not a good faith labor issue, and that therefore there is no "labor dispute," is to ignore the statutory definition of the term; *to say, further, that the conditioned abandonment of the vendor system, under the circumstances, was an issue unrelated to labor's effort to improve working conditions, is to shut one's eyes to the everyday elements of industrial strife.* (311 U.S. at 98-99; emphasis supplied.)

Thus, as long as the activity of the union was directly related to preserving wages and working conditions of its members, there existed a "labor dispute" within the meaning of the Norris-LaGuardia Act. And the Court found that relationship present because the vendors were in job and wage competition with the union's members.

Although arising in the context of whether the application of state antitrust laws to a union contract was preempted since a mandatory subject of bargaining under the National Labor Relations Act, *Teamsters Union v. Oliver*, 358 U.S. 283, is particularly significant here since the union practices approved there were analytically indistinguishable from those in the present case. In *Oliver*, this Court sustained the validity of a collective bargaining agreement which fixed the minimum rental which carriers were required to pay for trucks leased from owners who themselves

drove the trucks. The Ohio courts had held this provision to be a violation of the state antitrust law and unprotected by the National Labor Relations Act because it was but a "remote and indirect approach to the subject of wages."

Holding that the disputed clause was a mandatory bargaining subject, this Court reversed (358 U.S. at 293):

The text of the Article and its unchallenged history show that its objective is to protect the negotiated wage scale against the possible undermining through diminution of the owner's wages for driving which might result from a rental which did not cover his operating costs. This is thus but an instance, as this Court said of a somewhat similar union demand in another case, in which a union seeks to protect lawful employee interests against what is believed, rightly or wrongly, to be "a scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards. *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91, 98, 99."

*Meat Drivers v. United States*, 371 U.S. 94, synthesized the rulings of this Court in the phrase "job and wage competition." There it was held that unions may not regulate the activities of independent contractors in the absence of job and wage competition with workers. This was a civil antitrust action by the United States against a union which had taken into membership, as a separate local, a group of businessmen, who bought grease from various sources and sold it to processors; the earnings of these grease peddlers depended on the difference between the prices paid and received for the grease. The union fixed those prices at

which peddlers bought and sold the grease, and allocated accounts and territories. Violation of these conditions was punished by expulsion from the union, which effectively put the expelled peddler out of business because of union strikes and boycotts against processors who dealt with non-union peddlers. The processors, also obtained grease directly from restaurants, hotels and other institutions; in these transactions they picked up the grease from the selling institution through employee drivers who were members of the defendant union.

But, as this Court described it: (371 U.S. at 98):

There was no showing of any actual or potential wage or job competition, or any other economic interrelationship, between the grease peddler and the other members of the union. It was stipulated that no processors had ever substituted peddlers for employee-drivers in acquiring restaurant grease, or had ever threatened to do so. The stipulation made clear that the peddlers and the processors had essentially different sources of supply and different classes of customers. Based on these stipulated facts, the District Court affirmatively found that "there is no competition between (the employee and peddler) groups because each is engaged in a different line of work \* \* \*".

Since the stipulated facts established that the union's actions were not directed to protecting any legitimate union concern, the Court in *Meat Drivers* held that there was no "labor dispute" within the meaning of the Norris-LaGuardia Act. As in *Columbia River Packers v. Hinton*, 315 U.S. 143, the union was seeking to regulate only the "sale of commodities" and, therefore, dissolution was consistent with the Norris-LaGuardia Act.

The Court was, however, most careful to spell out the limited scope of its *Meat Drivers* holding: (371 U.S. at 103):

What has been said is not remotely to suggest that a labor organization might not often have a legitimate interest in soliciting self-employed entrepreneurs as members. Cf. *Milk Wagon Drivers' Union v. Lake Valley Farm Products*, 311 U.S. 91; *Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Wohl*, 315 U.S. 769; *Local 24 of Intern., etc. v. Oliver*, 358 U.S. 283. And both the Norris-LaGuardia Act and the Clayton Act ensure that the antitrust laws cannot be used as a vehicle to stifle legitimate labor union activities. But here the court found upon stipulated facts that there was no job or wage competition or economic interrelationship of any kind between the grease peddlers and other members of the appellant union. If that situation should change in the future, the District Court will have ample power to amend its decree.

To repeat, *Senn* raised a question of "reasonableness" under the Due Process Clause of the Fourteenth Amendment; *Lake Valley* and *Meat Drivers* involved the meaning of "labor dispute" in the Norris-LaGuardia Act; and *Oliver* treated with the scope of mandatory subjects of bargaining under the National Labor Relations Act. Thus in whatever context the issue of union regulation of independent contractors has arisen, this Court has undeviatingly based judgment on the underlying economic reality of job and wage competition, rather than on superficial verbalisms. Eschewing labels such as "independent contractor," "employer," "wages," "prices," "price-fixing," "profits" and "union" the Court in these cases searched out the

economic objective and impact of the challenged actions.<sup>13</sup>

And this was the basic approach of Mr. Justice White in *Meat Cutters v. Jewel Tea*, 381 U.S. 676, 690, n. 5, to the more general problem of determining when a union agreement with non-labor groups qualifies for the labor exemption:

The crucial determinant is not the form of the agreement—e.g., prices or wages—but its relative impact on the product market and the interests of union members. Thus in *Teamsters Union v. Oliver*, 358 U.S. 283, we held that federal labor policy precluded application of state antitrust laws to an employer-union agreement that when leased trucks were driven by their owners, such owner-drivers should receive, in addition to the union wage, not less than a prescribed minimum rental. Though in form a scheme fixing prices for the supply of leased vehicles, the agreement was designed “to protect the negotiated wage scale against the possible undermining through diminution of the owner’s wages for driving which might result from a rental which did not cover his operating costs.” *Id.*, at 293-294. As the agreement did not embody a “remote and indirect approach to the

<sup>13</sup> Particularly instructive is the Court’s explanation of *Oliver* in *United States v. Drum*, 368 U.S. 370, 382, n. 26:

*Local 24 of Inter. Broth. of Teamsters, etc. v. Oliver*, 358, U.S. 283, did not, as appellees suggest \* \* \*, hold that owner-operators are in any sense “employees.” That case held that a bargaining unit including an overwhelming majority of concededly employed drivers of carrier-owned equipment was entitled, under § 8(d) of the National Labor Relations Act, \* \* \* to bargain to impasse concerning minimum rentals to be received by owner-drivers. It was not necessary to determine whether the owner-drivers were “employees” protected by the Act, since the establishment of the minimum rental to them was integral to the establishment of a stable wage structure for clearly covered employee-drivers. See *id.*, at 294-295.



subject of wages' . . . but a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract," *id.*, at 294; the paramount federal policy of encouraging collective bargaining proscribed application of the state law. [Emphasis supplied]<sup>14</sup>

Consistent with the analysis that the "crucial determinant" is not the form of the union action but its relative impact, Justice White in *Jewel Tea* probed the ultimate factual bases offered in support of the union's contentions that its actions were immunized from the anti-trust laws by reason of the labor exemption. In this Court's view, " . . . the dispute between *Jewel* and the unions essentially concerned a narrow factual question . . . ." 381 U.S. at 694. Since the District Court had resolved those factual questions in the union's favor and its findings were not clearly erroneous, the union's claims that the activities were intimately related with wages, hours and working conditions were sustained.

---

<sup>14</sup> Mr. Justice White wrote for only three members of the Court in *Jewel*, and the Court was sharply divided in that case and its companion, *Mine Workers v. Pennington*, 381 U.S. 657, with respect to the scope of the labor exemption for union-employer agreements. But the proposition that the Court must look to the underlying realities appears to have been common ground. Thus, Mr. Justice Goldberg approved Mr. Justice White's reliance on the District Court's findings that the issue of market hours affected the employees in self-service markets in reaching the conclusion that it was a mandatory subject of bargaining. See 381 U.S. 676 at 727. And Mr. Justice Douglas, who reached the opposite conclusion, did so in part because he considered the finding on which Mr. Justice White relied to be contrary to "undisputed" evidence, *id.* at 737-738, and in part because of his view of the exemption whereby the critical reality in *Jewel* was the effect of the agreement on competition in the product market, see *id.* at 736-737.

In the instant case, too, the unchallengeable factual findings of job and wage competition between the leaders and employee-musicians<sup>15</sup> compelled the conclusion that the unions' activities were intimately related with wages, hours and working conditions and thereby protected by the labor exemption. Thus, the majority specifically accepted the District Court's findings of job and wage competition between leaders and employee musicians. See (App. 202). Indeed, Judge Anderson elaborated upon what the effect on employee wage standards would be if the union could not regulate the leader's earnings when he performed:

The establishment of price floors by union fiat may seem to be a different matter, however, when the orchestra leader actually performs with his orchestra. In that situation the services of a sub-leader would not be required and the leader may

---

<sup>15</sup> These findings, having been approved by the Court of Appeals are protected here by the settled rule that this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank and Manufacturing Company v. Linde Air Products Company*, 336 U.S. 271, 275; *Berenyi v. Immigration Director*, 385 U.S. 630, 635. No "very obvious and exceptional showing of error" can be made with regard to these findings. At the heart of the matter are the District Court's findings that (1) Conducting is a musical service, and a subleader performs all the musical services which a leader would perform if he were present (Findings 32, 36); (2) Each time plaintiffs personally conduct an orchestra they displace the services of a subleader who would otherwise have been engaged to conduct the orchestra (Finding 38); (3) When an orchestra leader performs an instrument he fills a requirement in the orchestra for that instrument just as any sideman does (Finding 44); (4) Each time plaintiffs play an instrument they displace the services of a sideman who would otherwise have been engaged to play the same instrument that the particular plaintiff played (Finding 45). (App. 130-132). These findings are abundantly supported by the evidence cited in their support by the District Court; nor did plaintiffs produce any evidence to the contrary.

in this way save the wages he would otherwise have to pay. Consequently, he could make the services of his orchestra available at a lower price than could a non-performing leader. (App. 199).

Yet, in its next step the Court of Appeals turned away from these critical factual findings and erroneously stated that: "The cases make it clear, however, that price-fixing generally is not a mandatory subject for collective bargaining but is one toward which union activity may not be directed without violating the anti-trust laws" (App. 199). The Court below thus adopted an approach diametrically opposite from that consistently utilized by this Court. Rather than according the proven factual basis for the unions' actions—the existence of job and wage competition—their full due, Judge Anderson's majority opinion brushed those facts aside on the mistaken notion that "price-fixing" is absolutely impermissible. Thus, irrelevant "form"—"price-fixing"—became the crucial determinant, and critical "impact" was ignored.

The District Court had properly rested its legal conclusions on uncontroverted detailed evidentiary findings of job and wage competition between the leader and employee musicians. The Court of Appeals, though accepting those uncontested findings, wholly misconceived their legal consequences. *Lake Valley, Oliver* and *Meat Drivers* established that the controlling factor in determining whether a union may regulate independent contractors is precisely whether they are in job and wage competition with employees. The Court of Appeals erred because it ignored the economic reality as revealed by the findings on this subject and thus disregarded what *Jewel* declared to be the "crucial determinant."

The fact that Mr. Justice White supported and illustrated his thesis in *Jewel* by reference to *Teamsters Union v. Oliver* and the other independent contractor cases is of special significance here. For the economic factors which govern the union's actions are identical to those in *Oliver*. And, even as the Court of Appeals here relied primarily on the characterization "price-fixing", so the Ohio courts in *Oliver* considered that the unions had engaged in "price-fixing" and that such a "remote and indirect approach to the subject of wages" was outside the national labor policy. See pp. 34-35, *supra*.

But this Court's decision in *Oliver* was premised on the realization that the union's wage scales would be subverted unless the owner-operator received a fair price for the lease of his truck. We know and can conceive of no method whereby a union can regulate the wages of a working employer except by fixing the minimum price for his total contribution to his customer. The union's wage scale means nothing if the employer who does the same work as his employee absorbs the cost of any part of that contribution. It was for that reason that the union regulation in *Oliver* came within the protection of the national policy even though it was "... in form a scheme fixing prices for the supply of leased vehicles ..." 381 U.S. at 690, n. 5.

The same considerations apply even more forcefully to the union's concern with performing leaders here. The majority below would prevent the union from requiring the leader to include his own wages in the price he must charge the purchaser—much less the equivalent value of the truck. The fact that Local 802's regulations take the form of a minimum price to



be charged the purchaser of music can be no more controlling here than the fact that the Teamster contract in *Oliver* specified the minimum rental the carrier had to pay.

In sum, if the establishment of a minimum price is considered in light of the economic realities, as found by the courts below, it is clearly lawful. Since it is designed to curb unfair job and wage competition from working employers, it is intimately related to wages, hours and working conditions and therefore exempted from the antitrust laws.

**B. Because of Job and Wage Competition, the Regulation of the Performing Leader's Income Is Lawful under This Court's Antitrust Precedents.**

Once the economic bases of the unions' conduct are appreciated, any difficulty in assessing the legality of the conduct is removed. Irrespective of the phrasing of the question, the answer is the same—the unions' response to the job and wage competition of the leaders is lawful. Historically, this Court has utilized three separate approaches. Thus, union conduct has been held free from antitrust liability (1) if the union has sought to eliminate price competition based on differences in labor standards or (2) if the union has not combined with a non-labor group or (3) if the subject of the union's concern is a mandatory subject of bargaining. As we shall show, the uncontroverted findings of job and wage competition compel the conclusion under each of these traditional approaches that the union regulations here involved do not violate the antitrust laws.



**1. Because of Job and Wage Competition, Regulation of the Performing Leader's Minimum Income Lawfully Eliminates Price Competition Based on Differences in Labor Standards.**

In *Apex Hosiery Co. v. Leader*, 310 U.S. 469, the Court declared that a combination of employees is not illegal though it restrains trade among them in the sale of their services to the employer. The Court found additional support for this holding in §6 of the Clayton Act which declared that "The labor of a human being is not a commodity or article of commerce \* \* \* nor shall such [labor] organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws". The Court then made the following fundamental pronouncement (310 U.S. at 503-504):

\* \* \* Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209, *an elimination of price competition based on differences in labor standards is the objective of any national labor organization*. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act. [Emphasis supplied.]

When the leader reduces the price he charges the purchaser of the music below the sum of his own scale wages and his out-of-pocket expenses (including the wages of the sidemen), he is engaged precisely in

“price competition based on differences in labor standards”. The differences in labor standards are those between the scale wages of the employee musician with whom he is in job competition, and his earnings for his own labor as a musician, which consist of the price charges, less his out-of-pocket expenses, including the wages of the other musicians.

The economic truth that an independent contractor who works at the trade and charges the purchaser of his services less than the sum of his out-of-pocket expenses and the union wage is competing unfairly by reducing the charge for his own labor has been fully appreciated by this Court. This was the very form of competition against which the agreement in the *Oliver* case was directed. If the owner-operator’s rental was insufficient to make up his actual costs, he had to make them up from his wages as a driver. It was for that reason that the collective bargaining agreement in *Oliver* was within the national labor policy though in form a scheme for fixing prices. See 358 U.S. at 293, quoted at p. 35 *supra*.

The *Apex* principle did not come into play in *Meat Drivers v. U.S.*, *supra*, because the grease peddlers were not in job competition with employee drivers, and therefore could not have affected the latter’s wage standards. Accordingly, their allocation of markets and fixing of prices was a pure and unconcealed violation of § 1 of the Sherman Act.

But as we have emphasized, this Court in *Meat Drivers* took pains to reaffirm the right of unions to solicit self-employed entrepreneurs as members. 371 U.S. at 103, quoted at p. 37 *supra*. In the present case the Court of Appeals correctly understood that *Meat Drivers* protects the right of defendant unions

to compel leaders into membership because there is job and wage competition between them and employee musicians. (App. 202). But it failed to comprehend the basic significance of *Meat Drivers* when it struck down the regulations which determined what the leader must earn for his labor. The "legitimate interest" which unions were acknowledged to have "in soliciting self-employed entrepreneurs as members" is precisely the power to control their impact on labor standards. This is the point of the citation in *Meat Drivers* of *Oliver and Lake Valley*. *Oliver* was concerned exclusively with controlling such impact;<sup>16</sup> in *Lake Valley*, membership and regulation were intertwined: "There are few instances of attempted unionization in which a change to union membership would not require some alteration in the conditions or terms of employment. Union membership contemplates change—change which it is believed will bring about better working conditions for the employees. \* \* \*." 311 U.S. at 98.

Union membership *per se* can never be a violation of the antitrust laws. To say that a union may lawfully admit persons into membership would thus be a sterile truism unless this right carries with it the right to achieve the objective of any union—"the elimination of price competition based on differences in labor standards." *Apex, supra*, at 503.<sup>17</sup> That portion of the Court of Appeals decision which correctly affirmed the

---

<sup>16</sup> *Oliver* was a union member, but this fact did not figure in the Court's decision.

<sup>17</sup> *Mine Workers v. Pennington*, 381 U.S. 657, reaffirmed the principle of *Apex* "that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards." 381 U.S. at 666.

unions' right to compel leaders into membership is irreconcilable with its holding that the union may not prescribe the minimum which the leader must receive when he performs.

**2. Because of Job and Wage Competition, There was no Combination Between the Unions and a Non-Labor Group.**

In *United States v. Hutcheson*, 312 U.S. 219, the Court inaugurated a different approach to the problem of antitrust liability of union activities. While not disturbing *Apex*, which was cited with approval, *id.* at 236, it held that "whether trade union conduct constitutes a violation of the Sherman Act is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." It followed therefore that union conduct described in § 20 of the Clayton Act (such as strikes and boycotts, which are the ultimate sanction behind the union's price regulations) cannot be held to be unlawful under the Sherman Act. Moreover, the Court held:

So long as a union acts in its self-interest *and does not combine with non-labor groups*, the licit and illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." 312 U.S. at 232 (Emphasis added.)

This proposition remains the law. It was reaffirmed in *Allen-Bradley Co. v. Local 3, I.B.E.W.*, 325 U.S. 797, 807, although the Court there made clear that no immunity is available when a union joins a conspiracy of businessmen. See also *Hunt v. Crumboch*, 325 U.S. 821, 825; *Mine Workers v. Pennington*, 381 U.S. 656,



662. Accordingly, when the leaders here accused the unions of violating the antitrust laws by establishing the minimum price which the leader must charge the purchaser of the music for a club-date engagement, they charged that the unions had combined with orchestra leaders. (App. 10). Therefore, one of the principal issues litigated at the trial of this case was whether such combination existed.

The complaining leaders alleged and sought to prove an *Allen-Bradley* combination on the theory that leaders who operate as they do are "employers" and therefore a non-labor group. (App. 120-123). But Judge Levet rejected this simplistic theory. He reasoned that if such leaders are employees, they "are certainly a labor group"; whereas even if they are employers or independent contractors, they will be a labor group "... if they meet the test of job or wage competition or other economic interrelationships. ..." (App. 163). Thus, while he assumed for purposes of discussion that the leader was the employer in the club-date field, he concluded, on the basis of his findings of job and wage competition, that nevertheless they were members of a labor group.<sup>18</sup>

---

<sup>18</sup> The Court of Appeals stated flatly that in the club-date field *all* leaders are employers. This sweeping decision was contrary to the Court's own prior decisions, which distinguished between leaders who never perform as sidemen and the great majority who do perform as sidemen, who were regarded as employees. See *Carroll v. A.F.M.*, 316 F. 2d 574, 575, n. 1. Moreover, the ruling went beyond the issues tried in the case, because the plaintiffs' contention was that only they and the relatively few leaders who perform as they do are employers. See the issues framed by the Court in its Pre-trial Order, Par. 8 (a)-(f) and 8 (1). (App. 120-122) However, because we are convinced that the union's regulations are lawful regardless of the leaders' status, we shall not add to this already long brief by dealing with this additional issue, though it was preserved in our Petition for Certiorari (p. 2, n. 1).



The Court of Appeals agreed that the unions had not combined with a non-labor group. (App. 194-195). It expressly rejected plaintiffs' claim that the present case comes within *Allen-Bradley v. Local 3, I.B.E.W.*, 325 U.S. 797. (App. 194-195). By the same token, *Mine Workers v. Pennington*, 381 U.S. 656, was found to be inapposite, because, as the majority put it, Pennington "reaffirmed" the *Allen-Bradley* principle. (App. 194). However, the Court of Appeals erroneously believed that *Meat Cutters v. Jewel Tea* established a "narrower ground on which the unions' activities must be tested" even where the union acts unilaterally. (App. 195).

But the foundation of this Court's analysis in *Jewel Tea* was that the union had entered into an agreement or "combination" with the Jewel Tea Company, a business enterprise which obviously could not qualify as a labor group. No one claimed or could claim that *Jewel Tea* was in job and wage competition with union members. The Court of Appeals acknowledged this fundamental difference in conceding that the unions' protective provisions here do not, as did those in *Jewel Tea*, "appear in agreements with employers." (App. 196). Instead, as the majority recognized, "They are unilaterally adopted by the unions and complied with by the Orchestra leaders. . . ." *Id.*

Having noted the essential difference between this case and *Jewel Tea*, the Court of Appeals then ignored its significance on the erroneous notion that the policy considerations are the same. (App. 196). There is simply no support in any of the decisions of this Court for the proposition that similar considerations apply where the union has not combined with a non-

labor group.<sup>19</sup> The Court of Appeals' view is therefore squarely contrary to the undisturbed holding in *Allen-Bradley* "that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups", 325 U.S. at 810. This Court had long anticipated—and rejected—the theory of the court below that unilateral union action must, on policy grounds, be subject to the same restrictions as union-employer agreements:

This, it is argued, brings about a wholly undesirable result—one which leaves labor unions free to engage in conduct which restrains trade. But the desirability of such an exemption of labor unions is a question for the determination of Congress. *Id.*

See also *Hunt v. Crumboch*, 325 U.S. 821, 824-825. And it will be recalled that this Court in *Allen-Bradley* directed that the injunction that the District Court had entered "be amended so as to enjoin only those activities in which the union engaged in combination with any person, firm or corporation which is a non-labor group \* \* \*. Without such a limitation, the injunction runs directly counter to the Clayton and the Norris-LaGuardia Acts." 325 U.S. at 812. So does the Court of Appeals' holding that defendants may not establish a minimum price for the performing leader.

<sup>19</sup> The Fifth Circuit has had no such misconception: "Our reading of the Supreme Court decisions in *Allen-Bradley Co. v. Local Union No. 3*, 325 U.S. 797 and the more recent cases of *United Mine Workers of America v. Pennington*, 381 U.S. 657 and *Local Union No. 189, Amalgamated Meat Cutters, etc. v. Jewel Tea Co.*, 381 U.S. 676 convinces us that in order for union activity to constitute a violation of antitrust laws in the circumstances here presented, there must be a combination of union and non-union business groups to create a monopoly, resulting in a restraint of trade or interstate commerce. *Cedar Crest Hats v. United Hatters*, 362 F. 2d 322, 326.

3. **Because of Job and Wage Competition, Regulation of the Performing Leader's Minimum Income Deals with a Mandatory Bargaining Subject.**

Having held that the union regulations here must be judged as if they were union-employer agreements, the majority below declared the sole test to be whether the union regulations deal with a mandatory subject of bargaining within § 8(d) of the National Labor Relations Act.<sup>20</sup> And because the majority concluded that the price which the performing leader must charge the purchaser of the music is *not* such a subject, it held the regulation to be unlawful under the antitrust laws. Since the decisions of this Court make clear that such union demands *are* mandatory bargaining subjects, the Court of Appeals erred even under its own highly questionable test.

This question is controlled by *Teamsters Union v. Oliver*, 358 U.S. 283. For there, the precise issue was whether provisions in a collective bargaining agreement that fixed the minimum rental an owner-operator might charge dealt with a mandatory subject of bargaining. This Court held that they did:

The inadequacy of a rental which means that the owner makes up his excess costs from his driver's wages not only clearly bears a close relation to labor's efforts to improve working conditions but is in fact of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles

<sup>20</sup> The majority derived this notion from Mr. Justice White's opinion in *Meat Cutters v. Jewel Tea*. We believe, as did Judge Friendly, that it seriously misunderstood *Jewel* in this regard and moreover that this misreading encompasses a too restrictive view of the labor exemption. However, for the reasons stated in the text, the regulations in this case can easily be sustained even under the too confining test declared applicable by the court below.

from service. *Cf. Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Wohl*, 315 U.S. 769. It is not necessary to attempt to set precise outside limits to the subject matter properly included within the scope of mandatory collective bargaining, *cf. National Labor Relations Board v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, to hold, as we do, that the obligation under § 8(d) on the carriers and their employees to bargain collectively "with respect to wages, hours, and other terms and conditions of employment" and to embody their understanding in "a written contract incorporating any agreement reached," found an expression in the subject matter of Article XXXII.

We have already demonstrated the precise economic parallel between the owner-operator provisions in *Oliver* and the establishment of a price floor for the performing leader. (pp. 42-43, *supra*)

It was, however, precisely in its failure to follow the underlying economic analysis of this Court in *Oliver* that the Court of Appeals erred. For that reason, we shall set forth its discussion of *Oliver* in full.

The cases make it clear, however, that price-fixing generally is not only not a mandatory subject for collective bargaining but is one toward which union activity may not be directed without violating the antitrust laws. The unions assert that in this case the price-fixing is essential to the mandatory subject of job protection, as it was in *Local 24 v. Oliver*, *supra*; but in that case the union members were faced with the probability that, if a particular minimum price were not charged as rent by the owner-operators of the vehicles, the employee-drivers, who were members of the union would have to accept substandard wages or see their jobs entirely "contracted out" by the em-

ployer. The circumstances constituting a possible threat to the employment of subleaders or the displacement of a sideman in the present case are not at all comparable. Nor is there any authority for holding that an employer must bargain on a labor union's demand that the employer perform no work himself which an employee could do. Moreover, many leaders become so because of their skill and reputation in playing certain instruments and their performance with their orchestras enhance the demand for the orchestra and provide more work for employees rather than less as is the case of "contracting out." See *Fibreboard Paper Products Corp. v. N.L.R.B.*, *Supra*, at pp. 220-225 (Stewart, J. Concurring). (App. 199).

We submit that this reasoning is unsound in several respects. To begin with, the court's *ipse dixit* that the situation is not "at all comparable" to that in *Oliver* is inconsistent with the Court's own statement earlier—based on the finding of the District Court—that if the leader does not charge the prescribed minimum, "He could make the services of his orchestra available at a lower price than could a non-performing leader." (App. 199). But the leader can do this, as the Court recognized, only by displacing the sub-leader and "... in this way sav(ing) the wages he would otherwise have to pay." And, there is neither evidence nor logic to support the Court of Appeals' assumption that leaders "enhance the demand for the orchestras and provide more work for employees rather than less." The record shows an abundance of competition among leaders of no particular fame to provide music which the purchaser has planned,<sup>21</sup> and no evidence that as

<sup>21</sup> This includes competition between leaders like plaintiffs and other leaders, like witness Stevens, who frequently also perform as sidemen and do not have their independent businesses.



much as one club-date engagement has ever taken place because a leader created the demand. The demand for music at weddings is created by the couple's decision to marry and not by any leader's skill or reputation.<sup>22</sup>

Moreover, the Court of Appeals wrongly stated that there is no authority holding that an employer must bargain on a labor union's demand that he perform no work himself which an employee could do. We note that this is not what the regulations here provide; rather, they establish the terms under which the employer can work at the trade. So understood, the situation is identical to that in *Oliver*.

But even on the Court's own terms, its statement is inaccurate. There is authority that a union demand

---

<sup>22</sup> Even under the mistaken view that leaders create jobs, Mr. Justice Stewart's concurring opinion in *Fibreboard Paper Products Corp. v. Labor Board*, 379 U.S. 203, 215, would not support the Court of Appeals' position. We submit that they attribute to that opinion a narrower view of the scope of mandatory bargaining than Justice Stewart took. The concurring justices agreed that subcontracting was a mandatory bargaining subject under the facts in *Fibreboard* because "all that is involved is the substitution of one group of workers for another to perform the same task in the same plant under the ultimate control of the same employer". 379 U.S. at 224. A provision which forbids an employer from performing employee functions qualifies precisely under this test since it substitutes "one group of workers for another to perform the same task." It in no way impinges upon those entrepreneurial decisions which Justice Stewart thought to be outside the areas as to which employers could be required to bargain, 379 U.S. at 223-224. Moreover, it is, of course, the majority opinion in *Fibreboard* which is the governing precedent. The Court there held that "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d)". 379 U.S. at 214. And in reaching this result, the Court, not surprisingly, followed *Teamsters Union v. Oliver*, 358 U.S. 283.

that supervisory personnel not perform employee work is a mandatory subject of bargaining. *Crown Coach Corp.* 155 N.L.R.B. 625, 628. If a union's effort to protect employee jobs from competition by his alter ego is a mandatory subject of bargaining, it is unthinkable that the result should or would be otherwise when the competition is from the employer himself.

The really significant error of the Court of Appeals is not, however, that it overlooked a decision of the National Labor Relations Board, nor even its assumption that a provision can be rendered unlawful under the antitrust laws by the fortuitous absence of affirmative prior authority holding it to be a mandatory subject of bargaining. The Court's pervasive error, as we have already explained, is its failure to appreciate the essence of the *Oliver* decision: that in determining whether a provision deals with a mandatory bargaining subject a court should not examine it in isolation but must determine whether, in light of all the circumstances, it affects legitimate union interests, that is, labor standards. Since the impact of a demand that an employer not perform work which can be done by his employees is to protect the employees' jobs, there is abundant authority that it deals with "wages, hours and other conditions of employment" within § 8(d) of the National Labor Relations Act. The National Labor Relations Board has held, with judicial approval, that subcontracting,<sup>23</sup> union hiring halls<sup>24</sup> and union

<sup>23</sup> *Fibreboard Paper Products v. Labor Board*, 379 U.S. 203.

<sup>24</sup> *N.L.R.B. v. Houston Chapter, Associated General Contractors of America, Inc.*, 349 F. 2d 449 (C.A. 5), cert. denied 382 U.S. 1026; *N.L.R.B. v. Tom Joyce Floors, Inc.*, 353 F. 2d 768 (C.A. 9); cf. *Teamsters Local v. Labor Board*, 365 U.S. 667, 676-677.

security<sup>25</sup> are all mandatory subjects of bargaining. What these provisions have in common is that they all seek to protect the job opportunities of employees represented by the union, whether it be against the employees of other employers, of employees hired by means over which the union has no control or of employees who are members of some other union or no union at all. If such provisions come within the phrase "wages, hours and other terms and conditions of employment", why should not protection of job opportunities against competition from the employer himself qualify?

Moreover, the phrase "wages, hours and other terms and conditions of employment" in § 8(d) of the National Labor Relations Act is closely related to the definition of "labor disputes" in § 13 of the Norris-LaGuardia Act as including "any controversy concerning terms, tenure or conditions of employment \* \* \*".<sup>26</sup> This Court has held controversies to be labor disputes where the objective was to secure job opportunities against workers of other nationalities<sup>27</sup> and races,<sup>28</sup> or members of other unions<sup>29</sup> or of no unions at all.<sup>30</sup> Logic—and the policies of the antitrust and labor laws—repel the notion that a union may

<sup>25</sup> *N.L.R.B. v. Bradley Washfountain Co.*, 192 F. 2d 144, 154, (C.A. 7); *N.L.R.B. v. Andrew Jergens Co.*, 175 F. 2d 130, 134 (C.A. 9), *cert. denied* 338 U.S. 827.

<sup>26</sup> *Fibreboard Paper Products, Corp. supra*, 379 U.S. 203, 210, relying on *Order of Railroad Telegraphers v. Chicago & N.W.R. Co.*, 362 U.S. 330.

<sup>27</sup> *Marine Cooks v. Panama S.S. Co.* 362 U.S. 365.

<sup>28</sup> *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552.

<sup>29</sup> *United States v. Hutcheson*, 312 U.S. 219.

<sup>30</sup> *United States v. A.F.M.*, 318 U.S. 743.

protect employees from competition from other workers in any of the classes covered by the cited cases, or from inanimate technological devices,<sup>31</sup> but that they are forbidden to preserve the same jobs from the competition of the employer himself. And what logic and policy reject, law does not require.

We believe that as long ago as in *Senn v. Tile Layers Union*, 301 U.S. 476,<sup>32</sup> this Court made clear that a union's concern with job competition from working employers is both direct and legitimate. In any event, however, the decision of this Court in *Oliver* is controlling and contemporary authority for the proposition that such union concern is so intimately related to wages, hours and working conditions as to be a mandatory subject of bargaining and to qualify for the labor exemption to the antitrust laws.

## II. THE UNION'S REGULATIONS OF THE NON-PERFORMING LEADER INCOME ARE LAWFUL

Establishment of a minimum price for the engagement when the leader does not perform raises a different and concededly more troublesome issue. For when the leader does not perform, he is not displacing an

---

<sup>31</sup> *United States v. A.F.M.*, *supra*; *United States v. International Hod Carriers, etc.*, 313 U.S. 539.

<sup>32</sup> That case involved a controversy over whether an employer should be permitted to work at the trade was held to be a "labor dispute" under the Wisconsin Labor Code. At the very next Term this Court declared that the definition of "labor dispute" in the Norris-LaGuardia Act "does not differ materially from that above quoted from the Wisconsin Labor Code . . ." *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 329. In *Lauf*, the Court also said that the controversy there—a strike for the closed shop—is "indistinguishable" from that in *Senn. Id.* at 328. Such a controversy was held to be within the Norris-LaGuardia definition in *Lauf* and in *United States v. A.F.M.*, 318 U.S. 741. See p. *infra*.



employee-musician. But the record shows and the District Court found, that there is another aspect to the economics of the club-date field which makes it necessary for the union to insist that the leader charge the minimum prescribed by the regulations in order to preserve the scale of the employee-musicians.

When the leader does not collect from the purchaser of music an amount sufficient to make up the total of his out-of-pocket expenses, including the sum of the scale wages of the sidemen he will, in fact, not pay the sidemen the prescribed scale. As one of plaintiff's witnesses put it, in response to a question by the court, "If the leader couldn't get scale he couldn't pay the sidemen's scale." (App. 61b). And leader Stevens testified:

Q. Have there been occasions in the past, when you were a leader bidding on a job, when you submitted a bid which was below the union's minimum price? A. Not in the last six or seven years.

Q. More than six or seven years ago, approximately six or seven years ago did you submit such a below scale bid? A. Yes.

Q. On such occasions were you paying your side men below scale? A. Yes. (App. 245b)

See also App. IV-1199; 44b. Indeed, in a letter signed by plaintiff Carroll under the letterhead of "Orchestra Leaders of Greater New York," originally a plaintiff in this case, it was stated:

"The failure by the Union to insist upon all leaders conforming with the law has resulted in unfair competition and very often, underscale conditions. Many sidemen who are receiving the Union scale as well as those who are working underscale are losing the Social Security and other benefits." (App. 418b.)



Accordingly, the District Court found:

It is unquestionably true that skimping on the part of the person who sets up the engagement so that his costs are not covered is likely to have an adverse effect on the fees paid to the participating musicians. By fixing a reasonable amount over the sum of the minimum wages of the musicians participating in an engagement to cover these expenses, the union insures that "no part of the labor costs paid to a \* \* \* [leader] would be diverted by him for overhead or other non-labor costs." *Greenstein v. National Skirt & Sportswear Ass'n, Inc.*, 178 F. Supp. 681, 689 (S.D.N.Y. 1959) (App. 170).

Given these findings, based on uncontradicted evidence, enforcement of a minimum price (based on his out-of-pocket expenses) when the leader does not perform, operates *in fact* to prevent him from competing with other leaders by reducing employee wage standards. *Apex* holds that the elimination of such price competition is not forbidden by the Sherman Act. This is not a case, as was *Allen-Bradley*, where the unions are concerned with the employer's income in the expectation that his general prosperity will enable him to provide more jobs and better wages for its members. Here the unions are acting not on the expectation that the employer's profits will trickle down to his employees; rather their action is based on their experience that unless the total scale wages flow into the leader's pocket from the purchaser of the music, they will not flow from the leader to the performing musicians. In those industries where employment is not casual, where the employer has made a capital investment and has a relatively stable, fixed labor force, a reduction in the price to his customers will not usually have a direct and automatic impact on wage

standards. But here the employees are hired to perform only a single, particular job of a few hours duration and not until the employer has already secured the engagement from the customer. If he fails to charge the customer an amount equal to the employees' wages, the musicians are not likely to—and frequently do not—receive their full wages. In this field, in contrast to what occurs where employment is stable, the effect on wages is direct and immediate. As *Apex* makes clear, the Sherman Act does not command that competition among entrepreneurs be preserved by destroying the wage standards of labor.

The analysis of *Meat Cutters v. Jewel Tea, supra* is likewise pertinent here. The court did not hold in *Jewel* that an agreement respecting marketing hours would always come within the labor exemption. Rather, it held that such an agreement was lawful because it was found that the marketing hours restriction had a substantial effect on hours worked by the union members. So it is with the regulation of the price which an entrepreneur must charge to his customers. In many cases, an agreement regarding this price will fall outside the labor exemption. But where the evidence demonstrates and the Court finds—as here—that the minimum which the union fixed is necessary to assure that the scale wages will actually be paid to the performing musicians, it comes within the labor exemption.

The requirement that the nonperforming leader obtain a certain minimum fee is justified also, as Judge Friendly observed, because the selection of the musicians to perform the engagement is itself a musical service for which the union may insist that the leader receive remuneration. (App. 205-206). For that reason

the union's contracts with broadcasters, recording companies and symphony orchestras provide that on each engagement there shall be an employee—that is a leader—who will perform this function and receive double scale therefor. The parties stipulated that:

The almost undeviating practice for at least 65 years, both for single and steady engagements has been for orchestra leaders to receive as minimum compensation for their services double the wages of sideman. This practice also applies to the rendition of services by leaders in such diverse areas as television, radio, phonograph recordings, motion pictures, symphony orchestras, night clubs, hotels, opera companies and theatres.<sup>33</sup>

No reason appears to us—and none appeared to Judge Friendly—why the leader should not be similarly compensated for his services on club dates.

### III. THE PRACTICES CHALLENGED IN NO. 310 ARE LAWFUL

#### A. Compelling Leaders To Be Union Members

Since leaders are in job and wage competition with employee musicians who are members of defendant unions, the union's right to admit them into membership is clear. This was settled by this Court in *Meat Drivers v. United States*, 371 U.S. 94, 103, which was followed on this issue by the Court of Appeals (App. 202). As we have shown (pp. 45-47 *supra*), the Court of Appeals erred in failing to recognize that the same statutory policies which preserve the unions' right to have the leaders as members authorizes them to accomplish the purpose of bringing them into the union—to regulate their job competition with its employee members.

<sup>33</sup>(Stipulated Fact 19, App. 104-105).

Plaintiffs assert, and the courts below found, that the unions compel leaders to be members. It is of course true that in *Meat Drivers* the Court said only that the union has a right to "solicit" competing, self-employed entrepreneurs as members. But whether membership is voluntary or involuntary does not affect the result under the Sherman Act. This is clear from the citation in *Meat Drivers* of *Lake Valley* where the vendors were compelled to join defendant union against their will. Plaintiffs point to § 8(b)(4)(A) of the National Labor Relations Act which makes it unlawful for a union by certain means to compel employers or self-employed persons to join a labor union, and claim that this requires disapproval of what they erroneously term the "*dictum*" of *Meat Drivers*. Pet. for cert. No. 310, p. 20. but § 8(b)(4)(A) of the National Labor Relations Act cannot affect the result under the Sherman Act, precisely because it amended neither the Sherman Act nor the Clayton Act. Nor did it change the definition of "labor dispute" in the Norris-LaGuardia Act. Of course, these laws and the National Labor Relations Act must be read together, but a significant element of the policy of the National Labor Relations Act is its scheme of remedies. See, e.g., *San Diego Unions v. Garmon*, 359 U.S. 236, 243, 247; *Liner v. Jafco*, 375 U.S. 301, 307; *Teamsters Union v. Morton*, 377 U.S. 252, 260-261. And the history of the Taft-Hartley Act demonstrates, as this Court recognized in the *Morton* case, that Congress deliberately eschewed application of antitrust sanctions to those union activities which it chose to make unlawful by the 1947 amendments. *Id.* Thus, whatever effect those amendments may have on the rights of the unions to compel leaders into membership, rendering them subject to the range of sanctions under the Sherman Act was not one of them.

### B. The Closed Shop

Plaintiffs complain that the unions "monopolize" the music industry by insisting that all professional musicians become members of the union. We think it is obvious that this is not the type of monopolization with which Congress was concerned in Sections 1 and 2 of the Sherman Act. The closed shop is not the monopolization "of any part of the trade or commerce among the several states," but rather a monopolization of job opportunities. *Apex Hosiery v. Leader*, 310 U.S. 469, 502-503. Additionally, as the Court of Appeals also recognized, a closed shop dispute concerns a "term or condition of employment", and therefore is exempt from the antitrust laws. The point was squarely decided adversely to plaintiffs in *United States v. American Federation of Musicians*, 318 U.S. 741, affirming 47 F. Supp. 304 (N.D. Ill.) Cf. *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323. Here again, the proscription of the closed shop in the Taft-Hartley amendments to the National Labor Relations Act cannot affect the result under the Sherman Act.

### C. Establishment of Minimum Employment Quotas

Plaintiffs also complain that defendants violate the Sherman Act by imposing minimum numbers of men as requirements for various types of engagements. The purpose of these minimums is, of course, to enhance job opportunities, which is an objective that the Sherman Act does not forbid, and which comes within the labor exemption because it is a "labor dispute" within the meaning of the Norris-LaGuardia Act. Both courts below correctly held that this issue is controlled in the unions' favor by *United States v. A.F.M.*, *supra* and *United States v. Carrozzo*, 37 F. Supp. 191, (N.D. Ill.) affirmed, 313 U.S. 539.



#### D. Failure to Bargain with Leaders

Plaintiffs contend that the unions violate the anti-trust laws by their historic practice not to bargain with orchestra leaders with respect to club-date engagements. The short answer to this claim is that a refusal to bargain by itself is not an agreement in restraint of trade, does not monopolize a market, or in any other way come within the range of activities prohibited by the Sherman Act. Here again, therefore, there is no necessity to look to the labor exemption. However, even if the other elements of a Sherman Act violation were made out, *Hunt v. Crumboch*, 325 U.S. 821 would foreclose plaintiffs' claim, as the court below correctly held. Plaintiffs apparently acknowledge this, but urge that *Hunt* should be overruled, pointing to Section 8(b)(3) of Taft-Hartley Act which makes it an unfair labor practice for a union which is the representative of employees to fail to bargain collectively with an employer. For the reasons stated earlier, this change in the National Labor Relations Act could in no event expand the liabilities of unions under the antitrust laws.<sup>34</sup>

---

<sup>34</sup> We should also point out that plaintiffs' implicit premise that the unions are in violation of Section 8(b)(3) is erroneous. The only conduct shown by the record is that Local 802 establishes the scale without bargaining, but by vote of the membership, or, pursuant to delegation, by the Executive Board. But such conduct, standing alone, does not constitute a violation of § 8(b)(3). Rather, it is an exercise of rights protected by § 7 of the National Labor Relations Act, as the National Labor Relations Board has held in a case involving plaintiff Cutler. *Associated Musicians of Greater New York, etc.*, 164 NLRB No. 8.

### E. The Form B Contract

The Form B contract, which leaders are required to use on engagements with the purchaser of the music,<sup>35</sup> states the terms and conditions of the engagement, and must be filed with the local union in whose jurisdiction the engagement is to be performed. One of the conditions described therein is that the purchaser shall have the right of control over the musicians performing the engagement; it also describes the purchaser of the music as the employer. Plaintiffs allege that the contract violates the antitrust laws, although the basis of their attack is not entirely clear. Plainly, the requirement that the leader give a copy of the contract to the union, so that the union can know which employee musicians are performing the engagements and under what conditions is not even remotely within the ambit of conduct which the Sherman Act regulates, and is a legitimate prerogative of the union.<sup>36</sup>

Plaintiffs object most vehemently to the provisions in the Form B contract which vest the right of control in the purchaser of the music, rather than the leader. If, as they insist, the contract is ineffective to vest control and employer status in the purchaser, it is plain that an ineffectual contract provision cannot

---

<sup>35</sup> This requirement applies also to engagements such as radio and recordings where the leader is unquestionably an employee. (Findings 86 *et seq.*, App. 144). In practice Local 802 does not require the use of Form B on club dates. Finding 90 (App. 145).

<sup>36</sup> The Court of Appeals, consistent with its view that the unions may not lawfully establish the minimum price which the leader must charge the purchaser of the music, said that "the contract form provided for the club date must, consistent with this decision, omit any provision which would, in effect, constitute price fixing" (App. 201). We agree, of course, that the union could not use the contract to police the maintenance of any illegal condition.

constitute an independent restraint of trade in violation of the Sherman Act.<sup>37</sup> Nor do plaintiffs show how the provision could restrain trade illegally if, as we believe, it does vest the purchaser with the right of control and employer status, at least for some legal purposes. And even if it were judged by the *Jewel Tea* test for union-employer agreements, the provision would be protected by the labor exemption, for it plainly relates to a mandatory subject of bargaining. It is difficult to imagine anything which is more obviously a term and condition of employment than the identity of the employer. A worker may be willing to work for and under the control of A and be unwilling to work for and under the control of B. This is the kind of judgment that persons in all walks of life make continually individually or in concert with others. Indeed, when *Teamsters Union v. Oliver* came to this Court for a second time, it was held that a provision in the owner-operator article which provided that all drivers would be regarded as the employees of the carrier, rather than those of the lessee of the truck dealt with a mandatory subject of bargaining. 362 U.S. 605, sustaining § 4 of Article XXXII, which is set forth at 358 U.S. 298-299.

#### F. Limitations on Traveling Engagements

The District Court found: "Various AFM regulations favor the employment of local musicians rather than musicians from outside the jurisdiction. The principal incentive to employ local musicians is a requirement that 'foreign' musicians be paid higher wages." (App. 175). But it held, and the Court of Appeals

<sup>37</sup> Nor, of course, could an ineffectual, or sham contract immunize conduct which would otherwise be unlawful under the antitrust laws.

agreed, that this conduct does not violate the antitrust laws. This decision is clearly correct. Although on this issue, there is no decision of this Court squarely in point on the facts, the Courts of Appeal have uniformly held that it is lawful for a union to protect local job standards by imposing limitations on foreign employers and the hiring of foreign workers. Even without reliance on the Norris-LaGuardia Act, the Second, Third and District of Columbia Circuits recognized this to be a right vouchsafed unions by Section 6 of the Clayton Act. *Rambusch Decorating Co. v. Brotherhood of Painters*, 105 F. 2d 134 (C.A. 2), *cert. denied*, 308 U.S. 587; *Barker Painting Co. v. Brotherhood of Painters*, 23 F. 2d 743 (C.A.D.C.), *cert. denied*, 276 U.S. 631 (1928); *Barker Painting Co. v. Brotherhood of Painters*, 15 F. 2d 16 (C.A. 3), *cert. denied*, 273 U.S. 748 (1927). Of course, the cases cited earlier herein, which hold that a union's effort to protect its members against job and wage competition constitutes a labor dispute under the Norris-LaGuardia Act and a mandatory subject of bargaining under the National Labor Relations Act apply equally where the competition is from workers from a different locality. See particularly *Marine Cooks & Stewards Union v. Panama Steamship Co.*, 362 U.S. 365, n. 27 *supra*.

### G. Booking Agents

The Federation licenses and regulates booking agents, that is, persons who secure engagements and contracts for members. The Federation requires that all booking agents who represent its members enter into a license agreement with the Federation, whereby they undertake not to charge more than a stated maximum commission and not to book orchestras at less than union scale wages and working conditions. See Find-

ings 115° and 116 (App. 150). The District Court found that these regulations resulted from a report made to the Federation's 1936 convention that "many booking agents charged exorbitant fees to members and booked engagements for musicians at wages which were below union scale" (Finding 118, App. 151). The District Court also found that subsequent to the adoption of the regulations governing booking agents these abuses were, "to a large extent," eliminated (Finding 119, App. 151). On the basis of these findings Judge Levet concluded:

Because the activities of the booking agents here have and had a direct and substantial effect on the wages of the members of defendants, I find that they are in an economic interrelationship with the members of defendants such that the defendants are justified in regulating their activities without contravening the Sherman Act. Furthermore, I find the regulations to be reasonably related to their interest in maintaining observance of union scale wages and working conditions. (App. 174-175).

The booking agent arranges for the wage of the other members of the orchestra as well as of the leader, and in so doing he performs the identical function which is performed by the union itself in other industries. Due to the history and practices of the entertainment industry, the union must operate through the booking agent on such engagements. We cannot see how the result under the antitrust laws, or the availability of the labor exemption, can depend on whether employee terms are arranged for by a union business agent, or by a booker.

Additionally, even if the booking agent is viewed only as the agent as the leader, he is subject to regula-



tion by the union to the same extent as the leader himself. Otherwise the union could regulate the conditions of the engagement when the leader deals directly with the purchaser of the music (as in the great majority of engagements) but would violate the law by regulating it when the leader chooses to use a booking agent. Plaintiffs have pointed to no basis in law or policy which would justify such an anomaly.

Finally, should the booking agent be considered as wholly independent—a wholly unrealistic approach—it would be lawful for the union to prescribe the price for which he may book an engagement. A reduction in that price below union scale can be achieved only by reducing the wages of the musicians performing the engagement. And it is precisely such competition which the Sherman Act does not compel unions to tolerate. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503. See pp. 44-47 *supra*.

#### H. Caterers

The District Court held that Local 802's regulations which forbid caterers from engaging musicians and which forbid kickbacks from leaders to caterers are lawful. The Court of Appeals found it necessary to decide this question, on the ground that plaintiffs have not shown that they were injured by those regulations. But since this case was tried only on the issue of liability, so that plaintiffs did not have the opportunity to show damages, we doubt that would be an adequate basis for rejecting their claims. However, plaintiffs do not press their objections to the regulations in this Court. The only reference to caterers in their Questions Presented is their claim that caterers are on the "non-labor groups" with whom the unions allegedly combine. See Question No. 1, p. 2,

and the incorporation by reference, id. n. 1. The short answer to this claim is that the unions do not combine with caterers at all, by agreement or otherwise. Thus, the premise of the only issue raised in plaintiffs' questions presented with respect to caterers falls, and there is no need to consider the matter further. If, however, the Court believes that the question of the legality of the regulations is properly before it, we urge that they be sustained for the reasons stated by the District Court (App. 175).<sup>38</sup>

---

<sup>38</sup> The twenty-seventh of plaintiffs' questions presented reads, "Is there a class of orchestra-leader-employers within the meaning of Rule 23 FRCP?" (Petition in No. 310, p. 7). Since plaintiffs do not explain whether they consider all orchestra leaders to be employers, and if so, whether all are in the class they represent, the answer to the question is "No." "In a true class suit the plaintiffs stand in judgment for the class and a judgment for or against the plaintiffs benefits or binds each member of the class personally under the principles of res judicata. The members of the class must, therefore, be capable of definite identification as being either in or out of it." *Giordano v. R.C.A.*, 183 F. 2d 558, 560-561 (C.A. 3).

### CONCLUSION

By reason of the foregoing, the judgment of the Court of Appeals should be reversed with directions to reinstate the judgment of the District Court dismissing the complaints in their entirety.<sup>39</sup>

Respectfully submitted,

HENRY KAISER  
EUGENE GRESSMAN  
GEORGE KAUFMANN  
RONALD ROSENBERG  
1730 K Street, N.W.  
Washington, D. C.

*Attorneys for Petitioners*

*Of Counsel:*

EMANUEL DANNETT  
JEROME H. ADLER  
DAVID I. ASHE

---

<sup>39</sup> Even if any of the unions' regulations should be held unlawful, the judgment below could not stand. The Court of Appeals directed the District Court to enter an injunction against defendants in plaintiffs' favor although none has yet shown that he is a "person who [is] injured in his business or property by reason of any unlawful act of defendants," as § 4 of the Clayton Act, 15 U.S.C. § 15 requires. Since the trial of the case on damages was severed from liability, and because the District Court dismissed the complaint in its entirety the plaintiffs are entitled to an opportunity to show injury on remand if they prevail on any of the substantive issues. But they are under no circumstances entitled to an injunction at this time.

**APPENDIX****Statutory Provisions Involved**

Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 1 provides in pertinent part as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal:

• • •

Section 6 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 17 provides:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 20 of the Clayton Act, 38 Stat. 738, 29 U.S.C. § 52 provides:

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there

is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person, or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Section 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 104 provides:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;



(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefit or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peacefully to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

Section 13 of the Norris-LaGuardia Act, 47 Stat. 73, 29 U.S.C. § 113 provides:

When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation;

or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it; and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the court of the District of Columbia.

**DEC 1 1967**

**NOS. 309 and 310**

**JOHN F. DAVIS, CLERK**

**IN THE**

**Supreme Court of the United States**  
**OCTOBER TERM, 1967**

**AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES  
AND CANADA AND ASSOCIATED MUSICIANS OF GREATER NEW  
YORK LOCAL 802, ET AL.,**

*Petitioners,*

*v.*

**JOSEPH CARROLL, ET AL.**

**JOSEPH CARROLL, ET AL.**

*Petitioners,*

*v.*

**AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES  
AND CANADA AND ASSOCIATED MUSICIANS OF GREATER NEW  
YORK LOCAL 802, ET AL.**

**ON WRITS OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT**

**BRIEF FOR THE  
AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AS AMICUS CURIAE**

**J. ALBERT WOLL**  
*General Counsel, AFL-CIO*

**ROBERT C. MAYER**

**LAURENCE GOLD**

**736 Bowen Building  
815 Fifteenth Street, N.W.  
Washington, D. C. 20005**

**THOMAS E. HARRIS**

*Associate General Counsel, AFL-CIO*  
**815 Sixteenth Street, N.W.  
Washington, D. C. 20006**

# INDEX

	Page
Interest of the AFL-CIO .....	2
Summary of Argument .....	2
Argument .....	6
I. The Union Activity Found Violative of Sherman Act is Legal Under <i>United States v. Hutcherson</i> , 312 U.S. 219 (1941) .....	7
II. The Union Activity Found Violative of the Sherman Act is Legal Under the Standards Enunciated in <i>Meat Cutters v. Jewel Tea Co.</i> , 381 U.S. 676 (1965) .....	14
Conclusion .....	30

## Citations

### CASES:

<i>Allen Bradley Co. v. Local 3, IBEW</i> , 325 U. S. 797 (1945) .....	10-11, 20
<i>Apex Hosiery Co. v. Leader</i> , 310 U.S. 469 (1940) .	19, 20
<i>Columbia River Packers v. Hinton</i> , 315 U.S. 143 (1942) .....	12
<i>Crown Coach Corp.</i> , 155 NLRB 625 (1965) .....	26
<i>Fibreboard Paper Products Corp. v. National Labor Relations Board</i> , 379 U.S. 203 (1964) .....	21, 22, 26, 27, 28
<i>Hunt v. Crumboch</i> , 325 U.S. 821 (1945) ...	3, 6, 9, 11, 14
<i>International Union, UAW v. Wisconsin Board</i> , 336 U.S. 245 (1949) .....	19
<i>Local 24, Teamsters v. Oliver</i> , 358 U.S. 283 (1959) .....	5, 6, 23, 24, 25, 26
<i>Loewe v. Lawlor</i> , 208 U.S. 274 (1908) .....	8
<i>Meat Cutters v. Jewel Tea Co.</i> , 381 U. S. 676 (1965)	3, 4, 5, 6, 12, 13, 14, 15, 16-17, 17-18, 19, 20-21, 22, 23, 26, 28-29
<i>Meat Drivers v. United States</i> , 371 U.S. 94 (1962)	12
<i>Milk Wagon Drivers v. Lake Valley Farm Products</i> , 311 U.S. 91 (1940) .....	3, 6, 11-12, 14

<i>Mine Workers v. Pennington</i> , 381 U.S. 657	
(1965) .....	3, 6, 12-13, 14, 15, 19-20
<i>Motor Coach Employees v. Missouri</i> , 374 U.S. 74	
(1963) .....	16
<i>National Labor Relations Board v. Wooster Division of Borg-Warner Corp.</i> , 356 U.S. 342	
(1958) .....	15, 28
<i>San Diego Building Trades Council v. Garmon</i> , 359 U.S. 236 (1959) .....	15
<i>United States v. Hutcheson</i> , 312 U.S. 219	
(1941) .....	3, 6, 8, 9, 11, 14, 15, 16, 19

STATUTES:

Section 20, Clayton Act, 38 Stat. 738, 28 U.S.C.,	
Sec. 52 .....	9, 10, 13, 14, 19
Section 4, Norris-LaGuardia Act, 47 Stat. 70,	
29 U.S.C., Sec. 104 .....	9, 10, 13, 14, 19
National Labor Relations Act, 61 Stat. 136, 73 Stat.	
519, 29 U.S.C., <i>et seq.</i> .....	19
Section 8(d) .....	15, 16, 21, 27
Sherman Act, 26 Stat. 209 <i>et seq.</i> , 15 U.S.C.	
Sec. 1-2 .....	7, 18

MISCELLANEOUS:

Cox, <i>Labor and the Anti-Trust Laws</i> , 104 U. Pa. L. Rev. 252 (1955) .....	2
Berman, <i>Labor and the Sherman Act</i> (1930) .....	8
Frankfurter & Green, <i>The Labor Injunction</i> (1930) .....	8
Rule 42, Rules of the Supreme Court of the United States .....	1
Rule 6, Federal Rules of Civil Procedure .....	9
S&B Webb, <i>Industrial Democracy</i> (London: Longmans, Green, 1902) .....	2



**IN THE**  
**Supreme Court of the United States**  
**OCTOBER TERM, 1967**

**NO. 309**

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES  
AND CANADA AND ASSOCIATED MUSICIANS OF GREATER NEW  
YORK LOCAL 802, ET AL.,

*Petitioners,*

*v.*

JOSEPH CARROLL, ET AL.

**NO. 310**

JOSEPH CARROLL, ET AL.

*Petitioners,*

*v.*

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES  
AND CANADA AND ASSOCIATED MUSICIANS OF GREATER NEW  
YORK LOCAL 802, ET AL.

**ON WRITS OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT**

**BRIEF FOR THE  
AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AS AMICUS CURIAE**

This brief amicus curiae is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The opinions below, jurisdiction, questions presented, and the statutory provisions involved are set out on pp. 1-3 of the Musicians' brief.

### INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 129 national and international unions representing approximately fourteen million members. Following a basic tenet of trade union philosophy, *see e.g.* S. & B. Webb, *Industrial Democracy* 173-177 (London: Longmans, Green, 1902) Cox, *Labor and the Anti-Trust Laws*, 104 U. Pa. L. Rev. 252, 276 (1955), these organizations strive to eliminate wage competition among all those who perform the same job in the same industry. In many instances it is vital to this effort to regulate the minimum compensation received by employers and independent contractors who, because of the nature of their work, are in direct wage and job competition with employees. Thus the portion of the decision below adverse to the Union, which invalidated just such an effort, strikes a blow to the jugular not only of the Musicians but of many other unions as well. For this reason the AFL-CIO, as the spokesman for the majority of organized workers, wishes to take this opportunity to advise the Court of its views on this matter.<sup>1</sup>

### SUMMARY OF ARGUMENT

1. In No. 309 the Court of Appeals held that the Musicians' regulations, which are designed to insure that all

<sup>1</sup> We will confine our remarks to the issues raised in No. 309 for two reasons. First, the general principles which govern that case appear to control the questions raised in No. 310. Second, the petition in No. 310 includes 27 Questions Presented, and some of these questions were not discussed in the body of the petition. Moreover, the Musicians argue that many of these questions either were not presented to the courts below or were not reached by them. Given the present confused state of No. 310 we have briefed only those matters that are clearly presented—the two questions raised in No. 309.

union members who perform musical services in the club date field receive the union scale, violate the Sherman Act. The union activity in question does not take the form of a combination between labor and non-labor groups through agreements or otherwise. It is confined to the internal union action of setting the scale and to concerted refusals to work, by union members, with those who undercut scale. This being so, the Court of Appeals' decision is erroneous since it is squarely in conflict with this Court's decisions in *United States v. Hutcheson*, 312 U.S. 219 (1941) and *Hunt v. Crumboch*, 325 U.S. 821 (1945). For *Hutcheson* and *Hunt* hold that no injunctions may issue, no damages may be assessed, no criminal penalty may be imposed, under the Anti-Trust Laws, if their effect is to interdict the use of economic weapons employed by a union in its self-interest during a labor dispute.

The Court of Appeals committed two fundamental errors which led to its conclusion that it was free not to follow *Hutcheson* and *Hunt*. First, it reasoned that the union activity here could not be said to grow out of a labor dispute even though designed to protect the wage standards of union member employees by regulating those who are in direct wage and job competition with those employees. This conclusion is directly contrary to this Court's decision in *Milk Wagon Drivers v. Lake Valley Farm Products*, 311 U.S. 91 (1940). Second, it concluded that the decisions in *Mine Workers v. Pennington*, 381 U.S. 657 (1965) and *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965) were intended to ease the restrictions on anti-trust control of unilateral union activity during a labor dispute. This, too, was error for both *Pennington* and *Jewel Tea* dealt with combinations between labor and non-labor groups and *Pennington* specifically reaffirmed *Hutcheson*.

2. In reaching its decision the Court of Appeals relied on *Jewel Tea*. *Jewel Tea* is inapposite here because it dealt with a combination of labor and non labor groups. In any

event the Musicians' regulations are legal under the tests proposed in *Jewel Tea*. In that case the union argued that every provision in a collective bargaining agreement dealing with "wages, hours and other terms and conditions of employment" as that phrase has been interpreted by the National Labor Relations Board, should be entitled to the labor exemption to the Anti-Trust Laws. The union argued further the the NLRB should have primary jurisdiction in anti-trust cases that turn on the meaning to be given to wages, hours and working conditions. Mr. Justice White rejected both portions of the union's argument. He stated that the test in cases stripped of allegations of a union-employer conspiracy against other employers should be whether the provision has an immediate and direct effect on wages, hours and working conditions. If it does, it is to be accorded the labor exemption. Moreover, he made it clear that in applying this test the practical impact of the provision in question and not its form is decisive. He did not, we submit, counsel the lower courts to balance, according to their own predilections, the legality of a union program which has an immediate and direct impact on its members labor conditions. Such an approach would, of course, run counter to basic legislative policies and to prior decisions of this Court and it would set the courts adrift in a trackless waste. Mr. Justice Goldberg, on the other hand, accepted the union argument that all mandatory subjects of bargaining are entitled to the labor exemption, while rejecting its primary jurisdiction argument.

The long-term effects of the differences between the opinions of Mr. Justice White and Mr. Justice Goldberg in *Jewel Tea* may well be substantial. However, the basic point, in the setting of the instant case, is that both concluded that certain combinations between unions and non-labor groups are entitled to the labor exemption, both recognized that a provision in a collective bargaining agreement which has a direct and immediate effect on

labor standards fits within that exemption and both recognized that a provision which parallels the agreement in *Local 24 Teamster v. Oliver*, 358 U.S. 283 (1959) is one which has such a direct and immediate effect.

In *Oliver*, the union sought to regulate the minimum compensation received by independent contractors who were in direct wage and job competition with employee union members, since they rendered essentially the same labor service. The situation confronting the Musicians here is precisely the same as that which confronted the union in *Oliver*. All those who perform musical services in the club date field, which includes the leader, the sub-leader and sidemen, are, on a number of levels, in direct job and wage competition with each other. And the Musicians' regulations found illegal by the court below are the direct minimum response to this situation compatible with the maintenance of the wage standards of its employee members. Since here, as in *Oliver*, the Union's activities have a direct and immediate impact on labor conditions they also are legal under *Jewel Tea*.

The argument thus far demonstrates that the Union's regulations here are concerned with [REDACTED] matter that falls within the scope of the mandatory subjects of bargaining. The Court of Appeals' decision to the contrary is, therefore, erroneous. Equally erroneous, is its conclusions that all provisions which are not mandatory subjects of bargaining are not entitled to the labor exemption. It is one thing to say that the NLRB should intercede to prevent a union from insisting on a particular provision. That, of course, is the effect of holding that a matter is a non-mandatory subject of bargaining. It is quite another thing to say that unions and employers should be subjected to anti-trust penalties if they voluntarily decide to work out their differences about a matter, which policy considerations that have nothing to do with the maintenance of a competitive economy, have been considered to remove



from the area of mandatory bargaining. The genius of collective bargaining is that it grows because of the efforts of such pioneers in labor relations. The decision of the Court of Appeals, if affirmed, would stultify the potential for such growth.

### ARGUMENT

This Court's decisions in *Mine Workers v. Pennington*, 381 U.S. 657 (1965) and *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965) brought to light a number of serious and important questions about the full extent and overall nature of the labor exemption to the Anti-Trust Laws as it applies to agreements between a union and a non-labor group. In addition, *Pennington* and *Jewel Tea* appear to have created problems of another dimension as well. Both cases produced three opinions, each expressing the views of three Justices. And the portion of the Court of Appeals' decision which relates to the Union's efforts to regulate the minimum compensation of leaders in so-called club date musical engagements, and which is the basis of the appeal in No. 309, indicates that this plethora of opinions has produced a certain amount of confusion about heretofore well settled propositions concerning the labor exemption—propositions which stem from this Court's earlier decisions in *United States v. Hutcheson*, 312 U.S. 219 (1941); *Milk Wagon Drivers v. Lake Valley Farm Products*, 311 U.S. 91 (1940); *Hunt v. Crumboch*, 325 U.S. 821 (1945); and from *Local 24 Teamsters v. Oliver*, 358 U.S. 283 (1959). It is this latter aspect of the effect of *Pennington* and *Jewel Tea* that we believe to be of the essence here. For it is our position that the most rational reading of *Pennington* and *Jewel Tea* is that they were not intended to disturb the earlier correctly decided cases just noted, that those cases should be followed here, and that they require a decision in favor of the Musicians in the instant case. Our brief will be devoted to developing the reasons for this conclusion.

**THE UNION ACTIVITY FOUND VIOLATIVE OF  
THE SHERMAN ACT IS LEGAL UNDER  
UNITED STATES v. HUTCHESON, 312 U.S. 219 (1941)**

In No. 309 the Court of Appeals held that the Musicians' regulations, which are designed to insure that all union members who perform musical services in the club date field, receive the union scale, violate the Sherman Act, 26 Stat. 209 *et seq.*, 15 U.S.C. Sec. 1-2. The union activity in question does not take the form of agreements of any kind with the purchaser of the music (A. 153, 185).<sup>2</sup> It does not take the form of a combination between labor and non-labor groups. (A. 163-164, 194).<sup>3</sup> Rather; as the Court of Appeals stated, the union has restricted itself to "unilateral action" (A. 188). The unilateral action of the Union may be simply described. The Union by internal regulations sets a scale which governs the minimum compensation its members will ask in return for their musical services. Any union member who works below scale may be tried before a union tribunal and expelled from the Union. If he is expelled, union members will not work with him in the future. Thus, the union members have made a collective decision to refuse, on a concerted basis, to work with those who undercut their scale. In the final analysis then, all that is involved here is a unilaterally conceived and executed plan, by union members who have not combined with a non-labor group, to gain a legitimate end in a labor dispute through concerted refusals to work. This being so, reversal of the portion of the judgment below adverse to the Musicians is mandatory under prior decisions of this Court.

<sup>2</sup> All "A" references are to the record Appendix printed for use in this court.

<sup>3</sup> The District Court developed at length the considerations that lead it to conclude that the leaders are a labor group. The Court of Appeals agreed with the District Courts conclusion, and the Musicians have briefed the issue fully. For that reason we do not discuss it here.

From *Loewe v. Lawlor*, 208 U.S. 274 (1908) to *United States v. Hutcheson*, *supra*, 312 U.S. 219, the Anti-Trust Laws were employed with a liberal hand to police union economic weapons used during labor disputes. See e.g. Berman, *Labor and The Sherman Act* (1930); Frankfurter & Green, *The Labor Injunction* (1930). *Hutcheson* signaled the end of this era by recognizing that Congress wished to remove refusals to work and the strike and the boycott, when employed in a labor dispute, from the regulatory ambit of the Anti-Trust Laws. Mr. Justice Frankfurter, speaking for the Court, put this conclusion in the following terms (312 U.S. at 231, 232):

"... [W]hether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct.

• • • •

"If the facts laid in the indictment come within the conduct enumerated in § 20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct shall not be 'considered or held to be violations of any law of the United States'. So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

The same point was recognized and emphasized by Mr. Justice Black, speaking for the Court, in *Hunt v. Crumboch*, *supra*, 325 U.S. at 824, 825:

"It is not a violation of the Sherman Act for laborers in combination to refuse to work. They can sell or not sell their labor as they please, and upon such terms and conditions as they choose, without infringing the Anti-trust laws. *Apex Hosiery Co. v. Leader*, 310 US 469, 502, 503. A worker is privileged under congressional enactments, acting either alone or in concert with his fellow workers, to associate or to decline to associate with other workers, to accept, refuse to accept, or to terminate a relationship of employment, and to terminate a relationship of employment, and his labor is not to be treated as 'a commodity or article of commerce.'

• • • • •

"... [C]ongress in the Sherman Act and the legislation which followed it manifested no purpose to make any kind of refusal to accept personal employment a violation of the Anti-trust laws. Such an application of those laws would be a complete departure from their spirit and purpose."

In sum, where the gravamen of the offense charged or proved in a Sherman Act proceeding is that a union, acting alone, has made illegal use of the strike or the boycott or its other economic weapons in connection with a labor dispute, there is a complete failure, to use the words of Rule 12(b)(6) of the Rules of Federal Procedure, to state "a claim upon which relief may be granted". The judgment must, therefore, go for the union. For *Hutcheson* and *Hunt* hold that pursuant to Section 20 of the Clayton Act, 38 Stat. 738, 28 U.S.C. Sec. 52, and Section 4 of the Norris-La-Guardia Act, 47 Stat. 70, 29 U.S.C. Sec. 104, no injunction may issue, no damages may be assessed, no criminal penalty may be imposed, under the Anti-Trust Laws, if their effect

is to interdict the use of economic weapons employed by a union in its self-interest during a labor dispute.

The leading case involving a union defendant in which this Court has sustained the finding of an anti-trust violation, and which is the fountainhead of the courts' remaining anti-trust jurisdiction in this field, is completely consistent with our argument. In *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945), the Court held that a union which had combined with a non-labor group could be held to account under the Anti-Trust Laws. However the scope of the decision was limited by the statement that "the same labor union activities may or may not be in violation of the Sherman Act dependent upon whether the union acts alone or in combination with business groups." *Id.* at 810. And the Court's handling of the order entered below in *Allen Bradley*, makes it perfectly plain that the line it drew was based on the fact that the existence of a combination provided a proper predicate, which would otherwise be absent, for appropriate relief, a severance of the ties between the union and the employers—relief which would not require a contravention of Section 4 of Norris-LaGuardia or Section 20 of the Clayton Act. Thus Mr. Justice Black stated (*Id.* at 812):

... [W]hen we turn to the sweeping commands of the injunction, we find that its terms, directed against the union and its agents alone, restrained the union, even though not acting in concert with the manufacturers, from doing the very things that the Clayton Act specifically permits unions to do.

\* \* \*

"Respondents objected to the form of the injunction and specifically requested that it be amended so as to enjoin only those prohibited activities in which the union en-



gaged in combination 'with any person, firm or corporation which is a non-labor group . . .' Without such a limitation, the injunction as issued runs directly counter to the Clayton and the Norris-LaGuardia Acts. The district court's refusal so to limit it was error."

The Court of Appeals committed two fundamental errors which led to its conclusion that it was free not to follow *Hutcheson and Hunt*. First, it reasoned (A. 195) that Union regulation of the leader's minimum compensation did not grow out of a labor dispute even though it recognized that the leaders were in direct wage and job competition with employee members of the Union and even though it recognized that the Union's regulations were designed to protect the wage standards of the employees. This conclusion is directly contrary to this Court's decision in *Milk Wagon Drivers v. Lake Valley Farm Products, supra*, 311 U.S. 91. There, the union, through picketing and other activities, sought to force independent milk vendors, whose inferior labor conditions were believed to enable them to undercut union standards, into the union in order to bring their conditions into line with those of its employee members. The Court held (*Id.* at 98-99):

"Whether rightly or wrongly, the defendant union believed that the 'vendor system' was a scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards. To say, as the Circuit Court of Appeals did, that the conflict here is not a good faith labor issue, and that therefore there is no 'labor dispute,' is to ignore the statutory definition of the term; to say, further, that the conditioned abandonment of the vendor system, under the circumstances, was an issue unrelated to labor's efforts to improve working conditions, is to shut

one's eyes to the everyday elements of industrial strife."<sup>4</sup>

Second, and this is to some extent related to its first error, the Court Appeals concluded (A. 195-196) that the line between the permissibility of anti-trust control of combinations of labor and non-labor groups, in certain circumstances, and the impermissibility of such control over unilateral union activity during a labor dispute in all instances was erased by the opinion of Mr. Justice White in *Jewel Tea*. We submit that this is misreading of that opinion, and that *Pennington* and *Jewel Tea* read together indicate a conscious desire to maintain and emphasize the distinction we stress here. In *Pennington*, Mr. Justice White stated (381 U.S. at 661-662):

"The antitrust laws do not bar the existence and operation of labor unions as such. Moreover, § 20 of the Clayton Act, 38 Stat 738, and § 4 of the Norris-LaGuardia Act, 47 Stat 70, permit a union, acting alone, to engage in the conduct therein specified without violating the Sherman Act. *United States v. Hutcheson*, 312 US 219.

. . . .

"But neither § 20 nor § 4 expressly deals with arrangements or agreements between unions and employers. Neither section tells us whether any or all such arrangements or agreements are barred or permitted by the antitrust laws.

. . . .

"... [I]n *Allen Bradley Co. v. Union*, 325 US 797, this Court made explicit what had been merely a qualifying

---

<sup>4</sup> In *Meat Drivers v. United States*, 371 U.S. 94 (1962) and *Columbia River Packers v. Hinton*, 315 U.S. 143 (1942) anti-trust violations were found on the ground that the independent contractors involved were not in wage and job competition with employees. This being so, there was no "labor dispute." But here there is such wage and job competition.

expression in *Hutcheson* and held that 'when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.' . . . Subsequent cases have applied the Allen Bradley doctrine to such combinations without regard to whether they found expression in a collective bargaining agreement. . . ."

Then in *Jewel Tea*, and building on the opinion in *Pennington*, Mr. Justice White noted (381 U.S. at 689):

"The fact that the parties to the agreement are but a single employer and the unions representing its employees does not compel immunity for the agreement. We must consider the subject matter of the agreement in the light of the national labor policy. We pointed out in *Pennington* that exemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws." (emphasis added)

Thus, Mr. Justice White began by focusing on the necessity of proof of a combination between a labor and non-labor group as the predicate for a viable lawsuit charging that a union has violated the Anti-Trust Law. In his words, "a union acting alone [may] engage in the conduct specified in [Section 20 of the Clayton Act and Section 4 of Norris-LaGuardia] without violating the Sherman Act." In other words, if there is no allegation of, or proof of, such a combination the action must be dismissed. Mr. Justice White then went on to conclude that "agreements" including an agreement between a single employer and the union representing its employees may constitute the basis for a Sherman Act violation precisely because "neither Section 20 nor Section 4 tells us whether any or all such agreements [i.e.

agreements between a union and a non-labor group] are barred or permitted by the antitrust laws." For this reason a court may set aside such an agreement without running directly counter to the Clayton and Norris-LaGuardia Acts, in other words the action is viable because it is not beyond the power of the courts to enter appropriate relief.

In short, there is nothing in *Pennington* or *Jewel Tea* which is at variance with our analysis; the Court of Appeals, we submit, simply misread those decisions. Indeed, it is perfectly plain that there could not be a variance. For the line *Hutcheson* drew was based on the Congressional intent as embodied in the explicit language of Section 20 of the Clayton Act and Section 4 of Norris-LaGuardia. Nothing has happened in the interim to indicate that Congress has modified the policies ascribed to it in *Hutcheson* and there is no evidence to indicate that *Hutcheson* misread those statutes or their underlying history.

## II

### **THE UNION ACTIVITY FOUND VIOLATIVE OF THE SHERMAN ACT IS LEGAL UNDER THE STANDARDS ENUNCIATED IN MEAT CUTTERS v. JEWEL TEA CO., 381 U.S. 676 (1965)**

Since the District Court found that there was no combination with a non-labor group here and the Court of Appeals agreed with that conclusion (A. 163-164, 184), we have emphasized the argument that this case is controlled by *Hutcheson*, *Hunt*, and *Lake Valley*. For this reason as just noted, we submit that *Jewel Tea* is inapposite because it deals with the status under the labor exemption of a particular type of combination between labor and non-labor groups. The Court of Appeals thought otherwise and, relying on *Jewel Tea*, held that the Union regulations setting the minimum compensation of leaders, constituted "price

fixing" which is outside the labor exemption (A. 195-197).<sup>5</sup> In this portion of our argument we shall assume *arguendo* that *Jewel Tea* is applicable and we shall discuss the Court of Appeals reading of it because it is our judgment that the court below has seriously misread the import of that case.

*Jewel Tea* is best understood in light of the union's argument to the Court. That argument may be summarized as follows: Unions may use economic force to secure an agreement on the subjects encompassed under the heading "wages, hours and other terms and conditions of employment." See *National Labor Relations Board v. Wooster Division of Borg Warner Corp.*, 356 U.S. 342 (1958). Indeed, employers commit an unfair labor practice if they refuse to bargain about the matters which fall within Section 8(d) of the National Labor Relations Act, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.* Moreover, under the principles enunciated in *Hutcheson* and *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) an employer

---

<sup>5</sup> The Court of Appeals correctly noted that *Jewel Tea's* companion case, *Pennington*, has no application here. Thus *Jewel Tea* dealt with a combination achieved through a collective bargaining agreement between a union and an employer, which is the product of bargaining in which the union acts "not at the behest of any employer group but in pursuit of [its] own policies", 381 U.S. at 688. And in *Jewel Tea*, Mr. Justice White emphasized that *Pennington* was distinguishable from *Jewel Tea*, since the latter came to the Court "stripped of any claim of a union-employer conspiracy against Jewel," *Ibid.* That statement is true here too for the Court of Appeals stated (A. 195):

"In the present case there is no evidence of a conspiracy between Local 802, or the Federation, and orchestra leaders to eliminate competitors, fix prices or achieve any other commercial restraint, nor was such a finding made by the district judge. Rather, the record establishes that all restraints were instituted unilaterally by the unions and acquiesced in by the orchestra leaders."

For this reason we do not discuss any of the serious problems raised by *Pennington*.



cannot enlist the aid of the Government, the National Labor Relations Board or the courts with the end in view of terminating, through the use of the injunction, or the threat of damages or of criminal penalties, a union's peaceful primary application of economic force. Unions are free to use their economic weapons because Congress has declared that "collective bargaining with the right to strike at its core is the essence of the Federal scheme" for achieving overall industrial peace, *Motor Coach Employees v. Missouri*, 374 U.S. 74, 82 (1963). Therefore, an agreement reached on these mandatory subjects of bargaining should enjoy the same status under the Anti-Trust Laws that the unilateral union conduct, which is the underlying basis for bringing the agreement into being, enjoys under *Hutcheson*. The union argued further that since the scope of Section 8(d) of the NLRA is the determining factor in the first instance, the NLRB and not the courts should have primary jurisdiction to decide whether a particular provision concerns wages, hours and working conditions.

This argument drew three responses from the Court. Mr. Justice White speaking for himself, the Chief Justice and Mr. Justice Brennan concluded that the marketing hour restriction under attack was exempt from the Anti-Trust Laws. However, he rejected the union's primary jurisdiction argument, 381 U.S. at 684-688 and he stated that his conclusion was not based "on the broad grounds urged by the union." *Id.* at 688. Instead, the test was to be as follows, (*Id.* at 689-690):

"Thus the issue in this case is whether the marketing-hours restrictions, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's length bargaining in pursuit of their own labor union policies, and not at

behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.<sup>4</sup>

He applied this standard in the following terms (*Id.* at 691, 692):

"Contrary to the Court of Appeals, we think that the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain.

. . . .

"And, although the effect on competition is apparent and real, perhaps more so than in the case of the wage agreement, *the concern of union members is immediate and direct.* Weighing the respective interests involved, we think the national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work. An agreement on these subjects between the union and the employers in a bargaining unit is not illegal under the Sherman Act.<sup>5</sup>

<sup>5</sup> "The crucial determinant is not the form of the agreement—e.g., prices or wages—but its relative impact on the product market and the interests of union members.

. . . .

"The unions argue further that since night operations would be impossible without night employment of butchers, or an impairment of the butchers' jurisdiction, or a substantial effect on the butchers' workload, the marketing-hours restriction is either little different in effect from the valid working-hours provi-

sion that work shall stop at 6 p.m. or is necessary to protect other concerns of the union members. If the unions' factual premises are true, we think the unions could impose a restriction on night operations without violation of the Sherman Act; for then operating hours, like working hours, would constitute *a subject of immediate and legitimate concern to unions members.*"

(footnote in the original, emphasis added)

The critical points in Mr. Justice White's analysis, as we read it, are: first, that the practical impact of the provision in question on wages, hours and working conditions and not its form is decisive; and second, that if the impact, on wages, hours and terms, and working conditions is "immediate and direct" the judicial inquiry is at an end and the provision is within the labor exemption. In other words, Mr. Justice White's opinion did not, we submit, counsel the lower courts to balance according to their own predilections or some ill defined non-statutory standard, the legality of a union program, which has an immediate and direct impact on its members' labor interests, against the impact of that program on the interests of employers, consumers, etc., even though that program also has an immediate and direct impact upon the latter.

We recognize that Mr. Justice White's opinion might be said to contain the implication that the courts may decide whether the direct benefits to employees of a provision are more or less important than the cost it entails to employers and consumers. However, we submit that there are very substantial, indeed overwhelming, considerations which militate against the adoption of that view. For such an approach would run directly counter to basic legislative policies. The history of judicial efforts under the Sherman Act to determine where the public interest in union organization and labor disputes lies, demonstrates the unsuitability of having the judiciary embark on that in-

quiry. Labor legislation from the Clayton Act through the Taft-Hartley Amendments to the NLRA has rejected the use of Anti-Trust Law as a means of resolving conflicts between the self-interest of employees, on the one hand, and of employers and consumers, on the other, as long as the employees are not seeking to advance their interests merely by providing a sheltered product market and thus conferring monopolistic power upon their employers. Both Norris-LaGuardia and the NLRA also rejected judicial appraisal of the justification for employees' concerted action. See *Hutcherson*, 312 U.S. at 232; *International Union; UAW v. Wisconsin Board*, 336 U.S. 245, 257-258 (1949). It would, therefore, be inconsistent with the trend of Congressional action and of this Court's prior decisions to allow judicial evaluation of the importance of the direct benefits for employees obtained from a collective agreement as compared to the costs of the restriction upon others. Moreover, the quotation from *Jewel Tea* set out above, pp. 17-18, *supra*, accentuates the point that in applying the standard he proposed, Mr. Justice White eschewed the approach which would set the courts adrift in such a trackless waste.

The law prior to *Pennington* and *Jewel Tea* recognized two basic types of restraints on competition that might come about from union activity—those that flow from programs which have a direct impact on the labor market. see, *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503 (1940),<sup>6</sup> and those that flow from programs which have a direct impact on the product market and from which workers get “nothing more concrete than a hope of

---

<sup>6</sup> “Since, the order to render a labor combination effective it must eliminate the competition from non-union made goods, see *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.”

better wages to come" *Pennington*, 381 U.S. at 663, see also *Allen Bradley*, 325 U.S. at 811. We submit that the most logical reading of the test proposed by Mr. Justice White in *Jewel Tea* is that it is a synthesis of the insights in *Apex* and *Allen Bradley*—a synthesis which provides that only agreements which have a direct impact on the product market and an indirect and speculative impact on wages, hours and working conditions are outside the labor exemption. Naturally, of course, as *Jewel Tea* indicates, this approach does not *per se* immunize classes of agreements from the Anti-Trust Laws. In many instances, as here, a detailed investigation of the facts will be necessary to measure the impact of the restrictions. But it does alleviate the possibility that the courts will be left at large in this delicate area.

Mr. Justice Goldberg speaking for himself, Mr. Justice Stewart and Mr. Justice Harlan, concurred in the Court's order validating the marketing hour restriction in *Jewel Tea*, and concurred also in Mr. Justice White's rejection of the union's primary jurisdiction argument, 381 U.S. at 710, n. 18. He, however, was of the view that all agreements on mandatory subjects of bargaining were entitled to the labor exemption. He stated (*Id.* at 710):

"Following the sound analysis of *Hutcheson*, the Court should hold that, in order to effectuate congressional intent, collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws. This rule flows directly from the *Hutcheson* holding that a union acting as a union, in the interests of its members, and not acting to fix prices or allocate markets in aid of an employer conspiracy to accomplish these objects, with only indirect union benefits, is not subject to challenge under the antitrust laws. To hold that mandatory collective bargaining is completely protected



would effectuate the congressional policies of encouraging free collective bargaining, subject only to specific restrictions contained in the labor laws, and of limiting judicial intervention in labor matters via the anti-trust route—an intervention which necessarily under the Sherman Act places on judges and juries the determination of ‘what public policy in regard to the industrial struggle demands.’ *Duplex Co. v. Deering*, supra, 254 US at 485.”

In the setting of the instant case, the critical fact to note about Mr. Justice Goldberg’s opinion, it seems to us, is that he agreed with Mr. Justice White that it is for the courts in the first instance, and not the NLRB, to decide whether a provision in an agreement is within the labor exemption. This would not be a matter of moment if it were always apparent whether a provision in question is encompassed by the concept “wages, hours and other terms and conditions of employment” as that phrase in Section 8(d) has been interpreted. But the application of Section 8(d) to particular situations is not a simple mechanical process. Terms and conditions of employment do not always define themselves. There are some matters, which are bargained about, that may be outside their scope. Thus, even Mr. Justice Goldberg’s decision requires the courts to look for an interpretive guideline. And up to a point, *within which this case falls*, the basic interpretive guideline developed under Section 8(d) to indicate whether a particular matter is a mandatory subject of bargaining overlaps that suggested by Mr. Justice White in *Jewel Tea*.

The latest expression of this Court as to the meaning of Section 8(d) is *Fibreboard Paper Products Corp. v. National Labor Relations Board*, 379 U.S. 203 (1964). In that case, the employer contracted out work because of economies

which were based on the inferior wage standards of the employees who received the work. In holding that such contracting out is a mandatory subject of bargaining, the Chief Justice, speaking for the Court, stated (*Id.* at 212-213):

“The situation here is not unlike that presented in *Local 24, Teamsters Union v Oliver*, 358 US 283, where we held that conditions imposed upon contracting out work to prevent possible curtailment of jobs and the undermining of conditions of employment for members of the bargaining unit constituted a statutory subject of collective bargaining. . . . “We held that the agreement was upon a subject matter as to which federal law directed the parties to bargain and hence that state antitrust laws could not be applied to prevent the effectuation of the agreement. We pointed out that the agreement was a ‘direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract. . . .’

“Thus, we concluded that such a matter is a subject of mandatory bargaining under § 8(d). *Id.* 358 US at 294-295. The only difference between that case and the one at hand is that the work of the employees in the bargaining unit was let out piecemeal in *Oliver*, whereas here the work of the entire unit has been contracted out.”

Thus, a basic component of the Court’s approach in *Fibreboard* was to determine whether the provision in question was addressed to the regulation of a matter that directly affected the wage standards and other working conditions of employees. That, too, is the essence of Mr. Justice White’s approach in *Jewel Tea*. Indeed, Mr. Justice White,

likewise, relied heavily on *Local 24 Teamsters v Oliver*, *supra.*, 358 U.S. 283, *see* 381 U.S. at 690, n. 5.<sup>7</sup>

We do not seek to minimize the importance of the differences between the opinions of Mr. Justice White and Mr. Justice Goldberg, or the important long-term effect of those differences. They may well be substantial, especially on the question of the extent to which the courts should plumb the underlying motives of the parties in order to determine whether or not the agreement in question is "bona fide" as that term is used by Mr. Justice White in *Jewel Tea* or whether it is the product of an anti-competitive program; on the question of type and quantum of evidence that is necessary to prove a *Pennington* type case; and on the question of the full scope of the labor exception for bona fide collective bargaining agreements. But this is not the occasion for the resolution of those questions. For the point here, we submit, is that both Mr. Justice Goldberg and Mr. Justice White concluded that certain combinations between unions and non-labor groups are entitled to the labor exemption, both recognized that a provision in a collective bargaining agreement which has a direct and immediate effect on labor standards fits within that exemption, and both recognized that a provision which parallels the agree-

---

<sup>7</sup> Mr. Justice Douglas, speaking for himself, Mr. Justice Black and Mr. Justice Clark, did not, as we read his opinion, reach the question of the status of agreements which are the product of union action which is not taken at the behest of an employer group, but in pursuit of its own policies. He analyzed *Jewel Tea* as a case in which the union, acting in concert with some employers with whom it dealt, sought to restrict competition in the product market, not to insure a direct benefit to butchers, but to disadvantage those employers who could sell meat after 6 p.m. without employing butchers. In other words, Mr. Justice Douglas, taking issue with the fact findings of the district court there, believed that as in *Allen Bradley*, the restraint on the product market was direct and that no direct labor benefit had been shown, *see* 381 U.S. at 735-738. Since there is no employer-union conspiracy here, we have not discussed the implications of his opinion. *See* p. 15 n. 5 *supra*.

ment in *Oliver* is one which has such a direct and immediate effect. There can be no doubt that the union's regulations here parallel the agreement in *Oliver*, and are a response to the same problem. The Court of Appeals' failure to appreciate this point is at the root of its error.<sup>8</sup>

In *Oliver*, as here, the union sought to regulate the minimum compensation received by independent contractors, who were in direct job and wage competition with employee union members since they rendered essentially the same labor service. This Court approved that union program stating (358 U.S. at 294-295):

"The inadequacy of a rental which means that the owner makes up his excess costs from his driver's wages not only clearly bears a close relation to labor's efforts to improve working conditions but is in fact of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service. Cf. *Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Whol.* 315 U.S. 769. It is not necessary to attempt to set precise outside limits to the subject matter properly included within the scope of mandatory collective bargaining, cf. *National Labor Relations Board v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, to hold, as we do, that the obligation under § 8(d) on the carriers and their employees to bargain collectively 'with respect to wages, hours, and other terms and conditions of employment' and to embody their understanding in 'a written contract incorporating any agreement reached,' found an expression in the subject matter of Article XXXII."

---

<sup>8</sup> The analytical infirmities in the Court of Appeals attempt to deal with *Oliver* are discussed fully in the *Musicians* brief.

The leader in the club date field furnishes one or a number of musical services, playing an instrument, conducting, selecting the sidemen, etc.<sup>9</sup> that are identical to the functions performed by employee musicians (A. 130-132, 163-164). Moreover, in club date engagements the leader is normally not a full-time leader but a musician who works also as a sub-leader or sideman in that field, and as an employee musician in other fields of the music industry (A. 33). Finally, in the club date field the marginal cost of the service is equal to the performers' compensation; it does not include a component attributable to capital investment. In short, all those who perform musical services in the club date field are, on a number of levels, in direct job and wage competition with each other.

The Musicians' regulations, found illegal by the court below, are the direct minimum response to this situation compatible with the maintenance of the wage standards of its employee members. It is true that this response is stated in terms of a minimum "price" to be charged, but as *Oliver* teaches, that is not determinative. When independent contractors compete with employees, attempts to maintain the standards of the latter, by regulating the former, must prescribe the minimum total compensation received by the independent contractor. For where, as here, the leader's mini-

---

<sup>9</sup> As Judge Friendly, dissenting below noted (A. 205):

"I fail to see why protecting the member who wants to make an extra charge of 25% when he assumes the additional burden of getting an engagement against being undercut by others willing to forgo it is not as legitimate a union objective as setting a differential for a sideman's playing more than one instrument or engaging in rehearsal. As the size of the band increases, the time and cost of obtaining engagements, picking the sidemen, and making sure they are on hand at the appointed time and place also grow. If the union wants to see that such services are compensated rather than have some members perform them without remuneration for their time, effort or out-of-pocket expenses, this objective does not cease to be intimately connected with wages, hours and working conditions' . . ."



minimum charge equals the total minimum wages of the sidemen plus the leader's minimum fee only two results can follow if the total price he charges is less than scale. First, that he has taken less than scale for his services, or second, that his sidemen are getting less than scale for their services. Either way there is a direct and immediate downward pressure on the scale of employee members of the union. Thus the effect of the Musicians' regulations is exactly the same as the effect of a contract between a union and an industrial employer in which it is provided that the agreed upon wage for each week is due and owing before work begins for that week and that if it is not paid the men will not work. Both are simply devices to insure that employees are paid scale. The superficial difference between the two is that the Musicians' regulation appears to look toward the product market while the latter type of provision clearly looks to the labor market. But once the rationale for the Musicians' regulation is plumbed, it is plain that the effect of both is the same; both have a direct and immediate impact on the labor market. Both are thus legal under *Jewel Tea*.

What we have said thus far demonstrates that the Musicians' regulation of the leaders' minimum compensation relates to a mandatory subject of bargaining for the same reason that the provision in *Oliver* was a mandatory subject of bargaining and that the dispute in *Fibreboard* related to a mandatory subject of bargaining. Indeed, the Board has specifically recognized that regulations which limit competition for jobs between employees and representatives of management are a mandatory subject of bargaining, see *Crown Coach Corp.*, 155 NLRB 625, 628 (1965). Thus, there should be no occasion here to pass on the Court of Appeals' erroneous conclusion that if a particular provision is a non-mandatory subject of bargaining it can never be entitled to the labor exemption (A. 197). Neverthe-

less, in order to afford the Court an overall picture of the problem we will deal briefly with that aspect of the decision of the court below.

If it were absolutely plain that every provision which has a direct and immediate impact on the labor standards of employees was recognized as a mandatory subject of bargaining, it might well be that the Court of Appeals' conclusion that non-mandatory subjects of bargaining are not within the labor exemption would be acceptable. Moreover we do believe that every such provision should be considered a mandatory subject and we submit further that there is not a single decision of this Court which takes a contrary view. However, we recognize that Mr. Justice Stewart's concurring opinion in *Fibreboard* indicates that three members of this Court may take the position that a provision which has a direct effect on labor conditions but also "lies at the core of entrepreneurial control", should not be considered a mandatory subject of bargaining, 379 U.S. at 224. We recognize also that this Court, while stressing the point that it is not "determinative", has looked to "industrial practices in this country" in Section 8(d) cases, *Fibreboard*, 379 U.S. at 211. This may indicate that the rule of decision in interpreting Section 8(d) may some day take a form that would provide that a provision with a direct effect on labor conditions may or may not be a mandatory subject of bargaining depending on the degree of interest the question has aroused among union members generally. But surely these considerations, neither of which go to the maintenance of a competitive economy, should not govern in the anti-trust area.

The question in Section 8(d) cases has always been considered to be whether the parties should be required by Government fiat to bargain about a particular matter. The decision that they should not leads only to the conclusion that the NLRB is to be afforded remedial powers to insure that the parties do not insist on a non-mandatory

subject to impasse. In the anti-trust field the question is whether the parties will be allowed to agree about a particular matter. And anti-trust regulation puts the availability of criminal and treble damage relief into the hands of private parties not simply into the hands of publicly selected, basically impartial, experts in labor relations. The difference in the questions asked, and the modes of relief available, suggest that the conclusion reached in one area is not determinative in the other. It is one thing to say that the NLRB should intercede to prevent a union from insisting on a particular provision, but it is quite another to say that unions and employers should be subjected to anti-trust penalties if they voluntarily decide to work out their differences about a matter as to which the labor laws leave them free not to bargain. The genius of collective bargaining is that it grows because of the efforts of such pioneers in labor relations. For just these reasons *Wooster Division of Borg-Warner*, sets up three categories of bargaining subjects—mandatory, permissive and illegal *see* 356 U.S. at 349. The Court of Appeals' analysis will inevitably tend to truncate this tripartite scheme into two categories—mandatory and illegal. For it is only natural to expect that parties who are unsure whether they wish to bargain about a matter which is not clearly mandatory will plead potential liability under the Anti-Trust Laws as an excuse. The net effect may be to restrict the creative growth of collective bargain. This was not the intent of *Wooster Division of Borg-Warner*. It is directly contrary to the intent of the NLRA which is to "promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation." *Fibreboard*, 379 U.S. at 211.

Finally, there is nothing in Mr. Justice White's opinion in *Jewel Tea* to indicate that this is not an open question. The critical passage is (381 U.S. at 689):

"Employers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects. But neither party need commits an unfair labor practice if it conditions its bargaining upon discussions of a nonmandatory subject. *Labor Board v. Borg-Warner Corp.* 356 U.S. 342. Jewel, for example, need not have bargained about or agreed to a schedule of prices at which its meat would be sold and the unions could not legally have insisted that it do so. But if the unions had made such a demand, Jewel had agreed and the United States or an injured party had challenged the agreement under the antitrust laws, we seriously doubt that neither the unions or Jewel could claim immunity by reason of the labor exemption, whatever substantive questions of violation there might be."

To us this means that a provision regarding a non-mandatory subject of bargaining that has only an indirect effect on labor conditions is not within the labor exemption. It does not speak to the broader issues raised by the Court of Appeals. Indeed the basic thrust of Mr. Justice White's approach is that decisions under Section 8(d) should not be the determinative factor under the Anti-Trust Laws.

**CONCLUSION**

For the above-stated reasons, as well as those presented by the Union, the judgment of the Court of Appeals should be reversed with directions to reinstate the judgment of the District Court dismissing the complaint.

Respectfully submitted,

J. ALBERT WOLL

*General Counsel, AFL-CIO*

ROBERT C. MAYER

LAURENCE GOLD

736 Bowen Building

815 Fifteenth Street, N.W.

Washington, D. C. 20005

THOMAS E. HARRIS

*Associate General Counsel, AFL-CIO*

815 Sixteenth Street, N.W.

Washington, D. C. 20006





**SUPREME COURT, U. S.**

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1967.

**No. 310**

**JOSEPH CARROLL, ET AL.,**

*Petitioners,*

*vs.*

**AMERICAN FEDERATION OF MUSICIANS OF THE  
UNITED STATES AND CANADA, ET AL.,**

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT.

**BRIEF AMICUS CURIAE ON BEHALF OF NATIONAL  
ASSOCIATION OF ORCHESTRA LEADERS.**

SHAYLE P. FOX,  
LAWRENCE M. COHEN,  
38 South Dearborn Street,  
Chicago, Illinois,

SAMUEL H. YOUNG,  
LAWRENCE H. EIGER,  
135 South LaSalle Street,  
Chicago, Illinois,

*Attorneys for Amicus Curiae,  
National Association of Or-  
chestra Leaders.*

Of Counsel:

LEDERER, BARNHILL & FOX,  
38 South Dearborn Street,  
Chicago, Illinois.

## INDEX.

---

	PAGE
Table of Authorities .....	ii
Interest of Amicus Curiae.....	1
Questions Presented .....	3
Summary of Argument.....	4
Argument .....	6
I. Orchestra Leaders Are Independent Businessmen and Entrepreneurs .....	6
II. Defendant Unions, in Conjunction With Busi- nessmen, Monopolize and Restrain Trade in the Industry .....	10
III. The Court of Appeals Erred in Permitting the De- fendant Unions to Retain Control Over Leaders..	15
IV. The Labor Exemption Applies to Wage Earners and Employees, Not to Independent Entrepre- neurs .....	20
V. There Is No Practical or Real Job or Wage Com- petition or Other Economic Interrelationship Be- tween Leaders and Subleaders or Sidemen.....	28
Conclusion .....	37

TABLE OF AUTHORITIES.

*Cases.*

Adams Dairy Co. v. St. Louis Dairy Co., 260 F. 2d 46 (8th Cir., 1958).....	27
Allen-Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, 325 U. S. 797 (1944) .....	15, 18, 27
American Column & Lumber Co. v. United States, 257 U. S. 377 (1921).....	10
American Federation of Musicians of the United States and Canada, 165 N. L. R. B. No. 110 (1967) .....	9
American Medical Assn. v. United States, 317 U. S. 519 (1943) .....	24
Associated Musicians of Greater New York, Local 802, AFM, 164 N. L. R. B. No. 8 (1967).....	9
Carroll v. American Federation of Musicians, 295 F. 2d 484, 486 (2d Cir., 1961).....	9
Carroll v. American Federation of Musicians of the United States and Canada, et al., 372 F. 2d 155 (2d Cir., 1967) .....	6, 7, 9, 15, 16, 19, 20, 33
Chicago Federation of Musicians, Local 10, AFM, 153 N. L. R. B. 68 (1965).....	9
Columbia River Packers Association v. Hinton, 315 U. S. 143 (1942) .....	22, 23, 24, 25, 30, 35, 37
Columbia Rivers Packers Assn. v. Hinton, 34 F. Supp. 970 (D. Ore., 1939).....	23
Cutler v. American Federation of Musicians, 316 F. 2d 546 (2d Cir., 1963).....	9
Cutler v. United States, 180 F. 2d 360 (Ct. Cl., 1960)...	9, 28

Interstate Circuit v. United States, 306 U. S. 208 (1939) .....	17
Javierre v. Central Altagarcia, Inc., 217 U.S. 502, 507 (1910) .....	29
Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U. S. 676 (1965) .....	14
Local 24, IBT v. Oliver, 358 U. S. 283 (1959) ...	18, 31, 33, 35
Los Angeles Meat & Provision Drivers Union v. United States, 371 U. S. 94 (1962) .....	34, 35, 37
Lumber Products Association, Inc. v. United States, 144 F. 2d 546, 549 (9th Cir., 1944) .....	27
Milk Wagon Drivers Local 753 v. Lake Valley Farm Products, Inc., 311 U. S. 91 (1940) .....	30, 31, 35, 36
New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552 (1938) .....	30
Northern California Pharmaceutical Assn. v. United States, 305 F. 2d 379 (9th Cir., 1961), cert. den. 371 U. S. 862 (1962) .....	17
Northern Pacific Railway Co. v. United States, 356 U. S. 1, 5 (1958) .....	16
Philadelphia Record Co. v. Manufacturing Photo-En- gravers Assn. of Philadelphia, 155 F. 2d 799 (3d Cir., 1946) .....	26
Ring v. Spina, 148 F. 2d 647 (2d Cir., 1945) .....	24, 25
Simpson v. Union Oil Company, 377 U. S. 13, 18 (1964)	29
Socony-Vacuum Oil Co. v. United States, 310 U. S. 150, 222 (1940) .....	16
Sugar Institute, Inc. v. United States, 297 U. S. 553 (1936) .....	10



Swift & Company v. United States, 196 U. S. 375, 398 (1905) .....	29
Taylor v. Local 10, International Union of Journeyman Horseshoers, 353 F. 2d 593 (4th Cir., 1965) .....	25
United Brotherhood of Carpenters and Joiners v. United States, 330 U. S. 395 (1947) .....	27
United Mine Workers v. Pennington, 381 U. S. 657 (1965) .....	19, 26, 27
United States v. Fish Smokers Trade Council, Inc., 183 F. Supp. 227 (SDNY, 1960) .....	35, 36, 37
United States v. McKesson & Robbins, 351 U. S. 305, 310 (1956) .....	29
United States v. The National Association of Real Es- tate Boards, 339 U. S. 485 (1950) .....	21
United States v. Womens Sportswear Mfgs. Assn., 336 U. S. 460 (1949) .....	22

### *Statutes.*

Clayton Antitrust Act, Sec. 6, 15 U. S. C. § 17 ...	3, 20, 29, 30
Clayton Antitrust Act, Sec. 20, 29 U. S. C. § 52 ...	3, 29, 30
National Labor Relations Act, Sec. 8(a) (2) and 8(a) (3), 29 U. S. C. §§ 158(a) (2) and 158(a) (3) .....	10, 11
Norris-LaGuardia Act, Sec. 4, 29 U. S. C. § 113(c) ..	4, 21, 26
Sherman Antitrust Act, Secs. 1 and 2, 15 U. S. C. §§ 1 and 2 .....	3, 16, 20, 29

### *Federal Rules of Civil Procedure.*

Rule 23(a) (1) .....	15
----------------------	----

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1967.

---

No. 310.

---

JOSEPH CARROLL, ET AL.,

*Petitioners;*

*vs.*

AMERICAN FEDERATION OF MUSICIANS OF THE  
UNITED STATES AND CANADA, ET AL.,

*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT.

---

**BRIEF AMICUS CURIAE ON BEHALF OF NATIONAL  
ASSOCIATION OF ORCHESTRA LEADERS.\***

---

**INTEREST OF THE AMICUS CURIAE.**

The National Association of Orchestra Leaders (NAOL) is the parent organization of several local associations of orchestra leaders who are the owners and operators of sole proprietorships, partnerships and corporations engaged in supplying live music to purchasers. The leaders generally conduct the orchestras which bear their respective names. NAOL has joined with its affiliate, Orchestra

---

\*Pursuant to Rule 42, ¶ 2 of the Rules of the United States Supreme Court, there have been lodged with the Clerk of the Court the written consents of counsel for the respective parties herein to the filing of this Brief Amicus Curiae.

Leaders Association of Northern Illinois (OLANI), and with some 27 orchestra leaders and a purchaser of music as plaintiffs in the case of *National Association of Orchestra Leaders, et al. v. American Federation of Musicians*, Civil Action No. 67-C-917, in the United States District Court for the Northern District of Illinois.\* Named as defendants in the suit are the American Federation of Musicians (AFM), the Chicago Federation of Musicians Local 10-208, AFM (CFM), 19 orchestra leaders and four booking agents. Counts I and II of that complaint allege that the defendant orchestra leaders, who compete with the plaintiff leaders, combined and conspired with each other, with the defendant unions and with the defendant booking agents to restrain the trade of the plaintiffs and monopolize the industry.

The concern of the amicus is that this Court, in formulating legal principles to resolve the issues in the above titled case, should be aware that the record before it reflects the trade practices and industry conditions in only one area of the country and that the conduct of leaders and AFM locals in other areas may have additional or different antitrust ramifications.

The purpose of this brief is to discuss the basic issues which, we believe, are common to both the instant matter and the Chicago litigation, and to apprise the Court of the differences between the two cases.\*\* The essential determination in both cases goes not merely to the various restrictive practices and rules of the defendant unions, but to the entire present relationship between orchestra leaders, as businessmen, and the unions, as organizations of both employees and businessmen.

---

\* Hereinafter referred to for convenience as "the Chicago case."

\*\* This brief and the Chicago case are largely concerned with the economic position of orchestra leaders in the so-called "club date" field and similar situations where the leader, as an independent contractor, sells a service to purchasers of live music.

The thesis of this brief, and the prayer for relief in the Chicago complaint, may be summarized thus: The policy of the Sherman Act\* requires that orchestra leaders, as entrepreneurs, be allowed (or, as the case may be, required) to compete freely. It therefore violates the most basic anti-trust concepts when unions which, in this case, are actually trade associations assimilated into labor organizations, regulate the purely commercial decisions and functions of leaders. To reconcile the Sherman Act's proscription of restraints of trade and the Clayton Act policy of protecting legitimate labor union objectives, the decision of this Court should recognize that leaders are entrepreneurs and, as such are not proper subjects of union membership and control. The separation of leaders from the AFM and its locals would place the parties in the traditional respective positions of labor and management and would dissolve the forum and the machinery of the combination by which restraints of trade among the leaders are effectuated.

### QUESTIONS PRESENTED.

Within the myriad of issues raised by the cross-appellants are three which go to the essential functions of a labor organization and the extent to which it can lawfully demand the membership of businessmen, thereby regulating, without any pretense of collective bargaining, their individual economic, business and competitive decisions.

1. Are orchestra leaders in the "club date" field independent businessmen and, hence, subject to the antitrust laws?

2. Assuming that orchestra leaders are businessmen (and employers), do Sections 6 and 20 of the Clayton Act\*\*

---

\* 15 USC §§ 1 and 2.

\*\* 15 USC §17 and 29 USC § 52.

and Section 4 of the Norris-LaGuardia Act\* exempt their association with and participation in labor organizations which insulate them from competition by regulating entrepreneurial and competitive economic functions that do not concern or affect their employees?

3. Given the status of the leader as a risk taker and owner of a goodwill peculiarly dependent upon his skill and personality, is there any real or practical job or wage competition between the leader and his employees which justifies the leader's membership in a labor organization?

#### **SUMMARY OF ARGUMENT.**

By every social standard and economic measure, orchestra leaders are independent entrepreneurs rather than wage earners employed in a master-servant relationship. Leaders bear the risks, costs and responsibilities of business enterprise and are compensated by profits, rather than wages. Notwithstanding the fact that leaders are businessmen, they are required to be members of the AFM and its locals which control, in great detail, their entrepreneurial functions and decisions. Thus, in essence, the union is a mixture of the characteristics of a trade association and a labor union. The Court of Appeals found that the price fixing activities of the defendant Local 802 were beyond the scope of the labor exemptions of the Sherman Act. But price fixing is only a single illegal activity. The unlawful nature of a trade association in the clothing of a union lies at the heart of this entire litigation and the Chicago case. With respect to its leader members, the AFM is a horizontal combination of competing businessmen who are bound by membership to agreement on or acquiescence in rules which regulate the competition among them. The force of competition and independent economic decision by each leader

---

\* 29 USC § 113(c).



can be restored only by a complete severance of leaders from the union. The argument that leaders are in job and wage competition with their employees and must therefore be regulated by the union to protect its interest ignores the economic realities of the industry. The ability of the orchestra to attract and retain purchasers of music (and thereby create employment for musicians) is entirely dependent upon the reputation, skill and personality of the leader; the goodwill of the business is personal to him. When a purchaser of music contracts with a leader, he generally expects that leader, not an unknown employee, to lead or play that engagement. Thus, the leader cannot displace an employee because the leader's presence is essential to the particular contract and to the future continuity of the business.

## ARGUMENT.

---

### I.

#### **ORCHESTRA LEADERS ARE INDEPENDENT BUSINESSMEN AND ENTREPRENEURS.**

The initial determination to be made by this Court concerns the position of the orchestra leader in the economic structure of the industry. The NAOL contends that orchestra leaders are entrepreneurs within every existing economic and social criteria, and, as such, are subject to the operation of the antitrust laws.

The Court of Appeals\* distinguished between "club date" engagements such as weddings and parties, which comprise the bulk of live music employment,\*\* and those relatively infrequent situations where the union has entered directly into a collective bargaining agreement with a hotel\*\*\* or recording company. According to the court,

\* *Carroll v. American Federation of Musicians of the United States and Canada, et al.*, 372 F.2d 155 (2d Cir., 1967).

\*\* Both lower courts found it necessary to define the industry terminology as to the different types of musical engagements. Unfortunately, the terminology, like so many industry practices, is not uniform throughout the country. An example is the confusion over the terms "club date," "single" and "steady" engagement. As the Court of Appeals observed, club date single engagements provide most of the employment for musicians. However, club date type engagements in Chicago are also contracted on a steady basis, and are identical to single club date engagements except that they last longer than one week. Therefore, for purposes of this brief, the term "club date" engagement will include steady as well as single engagements where the purchaser deals with and pays the leader who in turn hires, supervises and pays his sidemen.

\*\*\* Such agreements are generally not found in Chicago hotels or those in other major cities, and it appears that even New York hotels contract for music on a "club date" basis. A leader will contract to supply his orchestra for extended periods of time and will hire employees for the engagement in the same fashion as a "club date".

these agreements treat the leader as an employee with little distinction between the leader and the sidemen, each of whom are paid individually by the recording company.\*

However, the court found that in the "club date" field, the orchestra leader is an employer and an independent contractor whose "remuneration is the difference between his costs . . . and the amount received from the music purchaser" (372 F. 2d at 159); in other words, a profit. Compensation in the form of profit is perhaps the most important indicia of a businessman observed by the court, although it is by no means the only entrepreneurial characteristic of a leader. The leader is a businessman and employer who differs from other entrepreneurs only in the sense that his peculiar business goodwill is more closely related to his skill and professional personality than might be true in other industries. The entire business entity of the orchestra, its reputation, its ability to attract new customers and repeat business from old customers depends upon the leader. The leader's skill with his instrument, the style of music which he establishes for his orchestra, and his personality on the stage constitute the "commodity" which he is selling. Stan Kenton, one of the best known "name" orchestra leaders described the unique attachment of his business success to his own personality, as follows:

---

\* Aside from the existence of a collective bargaining agreement and the fact that the recording company pays the leader and sidemen individually, there is no substantive difference between recording and club date engagements. The leader still hires the sidemen, conducts and determines the orchestra's style and performance. Moreover, although the recording company pays sidemen's wages and deducts taxes, these costs are "advances" to the leader against his royalties from the record. If the record does not meet the leader's satisfaction, it is never released. (Tr. 1080.) The entire transaction with respect to the leader is on a profit or loss basis, not a salary. The leader is in no way an employee of the recording company despite the fictional master-servant relationship contemplated by the wording of the agreement. (Tr. 1198-1203; 1518-1519; 1536-1542.)

"Q: Would you be able to characterize the style or musical flavor of your orchestra?

A. Well, I think that my orchestra, like other orchestras, reflects my personality in music. It is the way I think music should be performed, and it is what I believe I have done to make my music, which is a commodity, a saleable commodity. It would be very awkward to stand in front of an organization you didn't believe in, so it has to reflect me." (Tr. 1030.)

In practical business terms, this skill and personality are the trademark of the enterprise. This is characteristic of the industry and it is as elementary to a "name band", i.e. one with a national reputation, as it is to a small orchestra known only in a particular city or region. (Tr. 1351, 1605.) In either case, the purchaser of music is completely unconcerned with what sidemen play the engagement; he chooses a particular band because of its leader.

In function, the orchestra leader is the economic risk taker: his compensation is the difference between costs and selling price. In addition, he has an investment in music stands, a music "library" of arrangements (frequently worth several thousand dollars), lights, uniforms, a vehicle, etc. (Tr. 566; 1164-65.) The leader also expends funds for advertising his orchestra to potential purchasers (Tr. 412) which, like the office he maintains (Tr. 1428; 411; 567), are overhead costs that do not necessarily vary with the volume of business. Moreover, the leader assumes the risk of the purchaser's credit; his expenses, including his sidemen's wages, deductions and taxes must be met, regardless of whether the purchaser pays for the orchestra as per the contract. Finally, the leader is an employer: he hires the sidemen, instructs them,

disciplines them, and, if their work is unsatisfactory, dismisses them.\* (Tr. 492-93; 567; 570.)

*Cutler v. United States*, 180 F. 2d 360 (Ct. Cl., 1960) was a suit by an orchestra leader for refund of federal unemployment compensation taxes. The Court of Claims observed that the purchaser of music dealt only with the leader, who was in the business of furnishing musical services. The leader was retained to supply a number of musicians playing a certain type of music under the leader's supervision; the individuals who played in the band were of no concern to the purchaser. The court described the role of the leader *vis a vis* the purchaser as follows:

"The purchaser was interested in the leader, not in the individual musicians, except in rare instances. The leader had established a reputation of putting on good performances. Because of this he was employed, not because of a certain man who played the violin or the trombone. What violinist or trombone player was to be employed was the leader's responsibility. The purchaser was interested only in the overall effect, in the montage, not the individual pictures.

"It was plaintiff, and not the purchasers who were in the business of providing music at social functions. *The success of this business depended on plaintiff's ability and reputation as a musician. He is the one who bears the loss and gains the profit.*" (180 F. Supp. at 362, 363, emphasis supplied.)

Other decisions have reached the same conclusion in different contexts. See *Cutler v. American Federation of Musicians*, 316 F. 2d 546 (2d Cir., 1963); *Carroll v. American Federation of Musicians*, 295 F. 2d 484, 486 (2d Cir., 1961).

The Court of Appeals held (372 F. 2d at 159) "that

---

\* *Associated Musicians of Greater New York, Local 802, AFM*, 164 NLRB No. 8 (1967); *Chicago Federation of Musicians, Local 10, AFM*, 153 NLRB 68 (1965); *American Federation of Musicians of The United States & Canada*, 165 NLRB No. 110 (1967).



orchestra leaders are employers in the club date field." However, the orchestra leader is more than an employer; he is also a businessman, operating an enterprise for profit in competition with other orchestras. The fact that a leader is an employer and is also a union member creates a possible violation of Section 8(a) (2) of the National Labor Relations Act\* but, in itself, does not determine whether such affiliation also violates the antitrust laws.\*\* Antitrust liability turns upon the leader's economic role not merely as an employer, but as an entrepreneur, and upon the union practices or rules which govern his business options. Given the entrepreneurial functions and characteristic of orchestra leaders, their combination in an ordinary trade association and their agreement, express or implied, within the association on various anti-competitive rules would clearly violate the Sherman Act. If such an association and agreements violate the antitrust laws, the trappings of union membership cannot provide immunity for an otherwise illegal arrangement.

## II.

### **DEFENDANT UNIONS, IN CONJUNCTION WITH BUSINESSMEN, MONOPOLIZE AND RESTRAIN TRADE IN THE INDUSTRY.**

In every restrictive union practice or regulation is the participation or acquiescence, either coerced or voluntary, by orchestra leaders as businessmen. Notwithstanding the status of leaders as businessmen, they are required by union fiat to be members of the union, on pain of being unable to engage sidemen, utilize the services of booking agents, or solicit customers. The AFM and its local affili-

\* 29 USC § 158(e) (2).

\*\* Certain conduct can, of course, violate both the antitrust and labor laws; the statutory violations and remedies are not mutually exclusive.

ates control almost every aspect of the music industry; union membership is virtually a prerequisite to doing business as an orchestra leader in the United States. This does not mean, however, that all leaders are coerced into joining the union. A number of leaders, as the Court of Appeals noted (372 F. 2d at 162), enjoy an advantage in diminished competition, and cooperate willingly with the union or directly participate in formulating price and other trade rules.

It is significant for antitrust purposes that the monopoly achieved by the AFM and its locals is not merely a "closed shop", a term in labor law pertaining only to union membership as a prerequisite to employment. With respect to leaders, the AFM represents an economic monopoly of businessmen organized in what is essentially a trade association. Equally significant are the substantial number of union regulations and practices which concern matters affecting only leaders and only in the entrepreneurial rather than labor-management aspects of their businesses. Several examples may be given: AFM By-Laws, Article 25, regulates in detail the terms of all transactions between leaders and booking agents, although agents never have any dealings with subleaders or sidemen. (530-31.) The so-called "Form B" and "Miscellaneous Musical Services" contracts require disclosure of information far beyond the wages or working conditions of employees. The contracts require disclosure of information such as the name of the purchaser and the price charged for the engagement.\*\* The

---

\* The court's statement that forcing leaders to be union members is exempt as a legitimate union concern for a "closed shop" (372 F. 2d at 167 and 168) is contrary to Sec. 8(a)(3) of the National Labor Relations Act, (29 USC § 158(a)(3)).

\*\* Clearly, no trade association could lawfully require such information from its members. Indeed, voluntary disclosure of price information to competitors under certain conditions has been held to violate the Sherman Act. *American Column & Lumber Co. v. United States*, 257 U. S. 377 (1921); *Sugar Institute, Inc. v. United States*, 297 U. S. 553 (1936).

By-Laws and "price lists" of the various locals require that the cost of certain items, such as transportation and uniforms, must be passed on to the purchaser, rather than being absorbed in whole or in part as the leader sees fit. (CFM Rules & Regulations, August, 1965, AFM By-Laws, Art. 16.) The locals impose a minimum number of musicians for an engagement depending upon the "class" of the place where the engagement is to be played, and the leader's "fee" varies with the number of sidemen required for an engagement. Regulations concerning traveling orchestras severely restrict the conditions under which the leader may solicit new business. (AFM By-Laws, Arts. 16 and 17.) Certain regulations forbid leaders from giving any inducement to prospective purchasers, another dictates the termination provisions of contracts between traveling leaders and purchasers. (AFM By-Laws, Art. 16, §§ 15 and 20.) One by-law even requires the leader to obtain permission from the president of the AFM before borrowing money for business purposes. (AFM By-Laws, Art. 25, § 23.)

In Chicago, the conspiracy between the leaders *inter se* and with the union is, we believe, more visible than in the instant record. Rules and regulations are passed upon by the Board of Directors and are enforced by the Trial Board of Local 10-208, both of which include orchestra leaders named as defendants in the Chicago case. Thus, a number of businessmen are able to agree among themselves and with the union to directly restrain the trade of their competitors by controlling prices and other trade practices which are the essence of competition. The record in the instant case does not indicate this degree of active participation by New York leaders in formulating the terms which restrain competition; it appears that most leaders in New York simply agree or are coerced into accepting the union imposed restraints. This is not to say, however, that

the record herein does not contain evidence of more active participation. Emil Paolucci is an orchestra leader who is also president of Local 38 (Larchmont) and a member of Locals 802 (New York City) and 402 (Yonkers). (Tr. 729.) Inasmuch as each local promulgates a price list, Mr. Paolucci's role in formulating prices for the Larchmont area is obvious. In addition, his membership in Locals 802 and 402 gives him at least a vote on their price lists. Mr. Paolucci is insulated from competition from Local 802 leaders because Local 38's prices are lower than 802's and union regulations require an 802 leader playing in another jurisdiction to charge the highest price (plus 10% for certain types of engagements) between the two locals. (AFM By-Laws, Article 15.) Whatever competition does enter Larchmont can be carefully watched by Mr. Paolucci since he has access to contracts containing prices and purchasers' names. (Tr. 755-56.) The testimony of AFM president Herman Kenin indicates that Mr. Paolucci's situation may not be unique. Mr. Kenin stated that leaders can be officers of locals, and thus can initiate price fixing and other restraints on competition. (Tr. 141-142.) Agreement on prices among leaders was also indicated by Al Manuti, President of Local 802, who testified that leaders attended price meetings and frequently presented resolutions concerning prices. (Tr. 252.)

The commercial orientation of many of these rules is perhaps best indicated by the following standing resolutions in Local 802's by-laws (Ex. CJ, pp. 75-76):

"A. Caterers, banquet managers and others connected directly or indirectly with halls, hotels and all similar establishments which provide facilities for public or private functions, are prohibited from engaging leaders or musicians, for such affairs.

"C. The payment or promise of payment, or any gift or consideration whatever, to the above is contrary to the principle of fair competition among mem-



bers of this local, and any member guilty of such offense shall be fined not more than Five Hundred Dollars (\$500.00) or suspended, or both."

Resolution A, which forbids one class of businessmen (leaders) from dealing with another class of businessmen (caterers), calls for nothing more or less than a concerted refusal to deal, i.e., a boycott. Resolution C refers to "fair competition", a concept which usually connotes the economic combat among businessmen to obtain customers. Nothing in either resolution suggests an effect, present or potential, on employees; both statements, by their terms, are addressed to business transactions.

The matters dealt with in the by-laws and regulations, like the prohibitions in Resolutions A and C, concern only the leader's conduct of his business in competition with other leaders. There is no direct or vital interest of the employees in the subject matter of these rules. Neither the examples cited above nor the other commercial rules of the AFM and its locals can be reasonably defined as relating to "terms and conditions of employment." This Court, in *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U. S. 676 (1965), examined the ambit of legitimate union concerns. Mr. Justice White phrased the issue thus:

"Whether the marketing hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions . . . [that it] falls within the protection of the national labor policy . . ." (381 U. S. at 689, 690.)

Thus, this Court has indicated that agreement at least with respect to prices, even in collective bargaining, violates the Sherman Act. This Court, we believe, should reach a similar conclusion with respect to horizontal agreements without collective bargaining concerning other purely business responsibilities.



## III.

**THE COURT OF APPEALS ERRED IN PERMITTING THE DEFENDANT UNIONS TO RETAIN CONTROL OVER LEADERS.**

The decision of the Court of Appeals misconceives the relationship between the unions and their leader members; it is inconsistent in finding a Sherman Act violation in the price fixing issue, but concluding, on the other hand, that leaders are properly the subject of union membership. At the outset, the basis upon which the court found that the plaintiffs do not represent a true class within the meaning of Rule 23(a)(1), FRCP, pinpoints the involvement of orchestra leaders in an almost classic *Allen-Bradley*\* employer-union combination:

"It is apparent that the present case does not qualify as a true class action under Rule 23(a)(1). It was brought by orchestra leaders as a direct challenge to the unions' control in the music industry, but there is evidence that many orchestra leaders are willing members of the union and subscribe to its policies; and there was no evidence offered by the appellants that such a group did not exist. *Indeed, the unions' price-fixing programs would assure those who are less successful and well-known of earning at least the union fee when they work instead of the lower sum they might get under free competition. The desire to protect their interests gives them the same motivation that generates most horizontal price-fixing arrangements. Similar economic benefits to orchestra leaders are inherent in other of the unions' regulations, for example, the restrictions on traveling engagements.*" (372 F. 2d at 162, emphasis supplied.)

In this holding, the court spells out the basic motives of

---

\* *Allen-Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*, 325 US 797 (1944).

leaders who, actively or passively, have joined the combination, i.e. the opportunity to avoid the rigors of competition. The court correctly observed that the price lists are "horizontal price-fixing arrangements." However, it appears that the court then contradicts itself by holding "... the price list is established *unilaterally* by Local 802" (372 F. 2d at 160, emphasis supplied), and finding no conspiracy between the unions and the leaders to restrain trade.

It is difficult to accept the concept of "unilateral" union action on prices because, for all practical purposes, the price minimums are the result of agreement, express and implied, among businessmen under union direction. The rationale of the finding that price fixing is a *per se* violation of the Sherman Act beyond the scope of lawful union activity creates a significant inconsistency in the Court of Appeals decision. The term "unilateral" implies action solely by the local sans any agreement or combination with other parties to effectuate the price mandate. The court apparently failed to recognize that price fixing, by definition, cannot be a unilateral action; the violation of Section 1 of the Sherman Act lies in the *agreement* on prices or the combination which reaches the unlawful result. *Socony-Vacuum Oil Co. v. United States*, 310 U. S. 150, 222 (1940). The *per se* doctrine applies to the particular type of restraint agreed upon; but the doctrine necessarily assumes the fact of an agreement. Thus, for example, price fixing, market allocation and boycotts have only the objective of eliminating competition and, therefore, are *per se* (or conclusively presumed) unreasonable restraints of trade. *Northern Pacific Railway Co. v. United States*, 356 U. S. 1, 5 (1958). However, Section 1 of the Sherman Act prohibits agreements in unreasonable restraint of trade, and one cannot agree with oneself. Hence, purely unilateral action

cannot violate the Act, even if it concerns something as *per se* unreasonable as prices.

In condemning price fixing by Local 802, the court by implication must have condemned an agreement to fix prices. Such an agreement could only have been entered into between the leaders and the union. The court noted the motivation of certain leaders to adhere to union established prices and similar competitive restrictions. The court also acknowledged that other leaders are coerced into agreement and refers to the votes taken on price lists by the membership of the local, which includes leaders. The inclusion of leaders in these decisions forms the unlawful combination.

However, even assuming that the leaders merely acquiesced in the uniform price minimums and other restraints established by the union, their conduct would violate the Act under the rule of *Interstate Circuit v. United States*, 306 U. S. 208 (1939). Since each leader knew that his competitors would adhere to the established prices, the consequences under Sherman 1 would be the same as if they had expressly and simultaneously agreed on such prices. In this sense, the acceptance by leaders of prices and other restraints dictated by the union falls directly within the *Interstate Circuit* doctrine:

"It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. (Citing cases.) Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequences of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." (306 U. S. at 227.)

In *Northern California Pharmaceutical Assn. v. United States*, 305 F. 2d 379 (9th Cir., 1961) cert. den. 371 U. S. 862 (1962), the Ninth Circuit noted that uniform drug price

lists, although widely distributed by the defendant Association, were not necessarily adhered to by pharmacists who received them. Nonetheless, the court found a violation of the Sherman Act in the preparation and dissemination of the lists, because of their purpose and tendency to create price uniformity. In both those cases, the absence of active or overt agreement did not affect the illegality of the conduct in question. In the instant matter, if, as the court stated, the leader's remuneration is actually a profit, and if the union's regulations concerning profits, solicitation and customer relations insulate the leaders from competition, then it follows that such restrictions are really business restraints, not the product of a "labor dispute". As such, they are subject to antitrust proscriptions when agreed upon by businessmen, even if the businessmen did not originate the restraints. *Allen-Bradley Co. v. Local Union No. 3, supra*, 325 U. S. at 799.

But the major inconsistency in the decision is the disparity between the basis of the court's finding on price fixing and its approval of union coercion to require leader membership. It would seem that the rationale which denies the labor exemption to price fixing by leaders and a union must also require that leaders, as businessmen, be dissociated from the organization which fomented not only price agreements but a host of other purely commercial restraints as well.

In ruling that union price regulations could not be justified under the "labor dispute" criteria, the court differentiated between the respective roles of leader and sideman in the club date field and the "contracting out" problem arising from the close relationship of an employee-driver's wages and the rental paid to independent driver-owners performing the same job, as in *Local 24, IBT v. Oliver*, 358 U. S. 283 (1959). The court stated:



"The circumstances constituting a possible threat to the employment of subleaders or the displacement of a sideman in the present case are not at all comparable. Nor is there any authority for holding that an employer must bargain on a labor union's demand that the employer perform no work himself which an employee could do. Moreover, many leaders become so because of their skill and reputation in playing certain instruments and their performances with their orchestras enhance the demand for the orchestras and provide more work for employees rather than less as is the case of 'contracting out.' " (372 F. 2d at 166.)

Thus, the court determined that there is no meaningful job or wage competition between leaders and their employees because leaders must lead in order to maintain their businesses. However, two pages later (372 F. 2d at 168) the court concludes that pressure on orchestra leaders to join the union reflects a legitimate labor interest in a closed shop, "and is not to be confused with cases in which labor unions have imposed membership upon employers who do not present job threats to union members." (372 F. 2d at 168.) This is totally inconsistent with the earlier finding that there is insufficient wage, job or other economic relationship between leaders and sidemen or subleaders to justify price fixing. Moreover, the failure of the Court of Appeals to find an illegal conspiracy or combination inherent in the association of the leaders with the union legitimizes, under the "mandatory subjects of bargaining" rubric, agreements among the leaders on matters such as minimum employment classifications (to which the leader's price is tied) and travel restrictions. Both matters are within the ambit of legitimate union concern as subjects on which the parties must bargain. However, if these areas become the objects of a combination or conspiracy between businessmen and a union, they cease to be exempt. *United Mine Workers v. Pennington*, 381 U. S. 657 (1965).



The court also concludes that, absent a conspiracy, the union's travelling restrictions, employment quotas and its regulation of booking agents do not violate the Sherman Act because the national labor policy demands that the parties be free to bargain about them. (372 F. 2d at 165, 166.) The difficulty with this conclusion is a) the evidence of combination and conspiracy between businessmen *inter se* and with union, and b) the fact that there is no freedom for orchestra leaders in determining the various economic issues, because they are governed by union rules, rather than by bargaining.

Considering the extent of regulation by the union of business decisions and functions often as unrelated as prices to "terms or conditions of employment," and the anti-competitive benefits which accrue from union affiliation, the very structure of this combined labor and trade association, not just its price fixing activity, is subject to attack under the antitrust laws. Membership of leaders, whether voluntary or coerced, stifles competition in a wide range of business functions and limits the economic freedom of leaders as businessmen, which the Sherman Act protects.

#### IV.

#### **THE LABOR EXEMPTION APPLIES TO WAGE EARNERS AND EMPLOYEES, NOT TO INDEPENDENT ENTREPRENEURS.**

Section 6 of the Clayton Act states that "the labor of a human being is not a commodity or article of commerce" and that labor organizations cannot "be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." But in several decisions, this Court and the lower courts have made it clear that the statutory language was meant to apply to labor unions involved in disputes which concern the employer-employee

relationship and the welfare of their members as employees.\* Thus, the benefit of the exemption has been denied to combinations of individuals dealing as entrepreneurs in the sale of goods and services, *vis a vis* wage earners employed by others. This distinction between commercial enterprise and employee, in the instant matter, goes not only to whether the various AFM rules and practices concern "mandatory subjects" of bargaining, but, equally important, whether the leaders who participate acquiesce or are coerced into the combination are within the ambit of the Clayton Act exemptions.

In *United States v. The National Association of Real Estate Boards*, 339 U. S. 485 (1950), suit was brought by the Government to enjoin six defendants from engaging in a conspiracy to fix real estate broker commissions within the District of Columbia, under a code of ethics which called for maintaining a schedule of fees. The defendants claimed that the business of a real estate agent was not within the purview of "trade" as used in Section 3 of the Sherman Act. This Court differentiated between "labor" as used in Section 6 of the Clayton Act and the application of the term "labor" to entrepreneurs, saying:

"Members of the Washington Board are entrepreneurs. Some are individual proprietors; others are banks or corporations. Some may have no employees; others have large staffs. But each is in business on his own. The fact that the business involves the sale of personal services rather than commodities does not take it out of the category of "trade" within the meaning of Section III of the Act. The Act was aimed at combinations organized and directed to control of the market by suppression of competition 'in the marketing of goods and services.' " (339 U. S. at 490.)

---

\* While the labor-management relationship is the object of the statute's protection, the parties to the dispute need not actually be each other's employers or employees. 29 U.S.C. § 113(c).

In *United States v. Women's Sportswear Mfgs. Assn.*, 336 U. S. 460 (1949), this Court held that stitching contractors, although furnishing chiefly labor, were possessed of all the characteristics of business such as rents, capital costs and profits, and hence were entrepreneurs, not mere laborers. In *Women's Sportswear*, the restraints of trade agreed upon among the contractors were embodied in an agreement with the jobbers for whom they worked. The contractors' association contended that union shop provisions insulated the otherwise clearly unlawful agreements from Sherman Act prosecution. The interjection of a union shop, however, could not save the conspiracy even though contractors' employees or the union incidentally derived some benefit from the restraints agreed upon.

Liability under the Sherman Act for agreements among commercial enterprises is not altered by the fact that the restraining agreements are entered into under union auspices or that the entrepreneurs are union members. The few cases dealing with Sherman Act combinations of businessmen within a union appear to turn on whether the individuals involved are wage earners or entrepreneurs whose profit has no meaningful effect on wages, hours or working conditions. The axiom that entrepreneurs, simply by joining a union, cannot benefit from the economic power which inures to labor organizations as representatives of wage earners was established in *Columbia River Packers Association v. Hinton*, 315 U. S. 143 (1942). There, the Pacific Coast Fisherman's Union, acting as bargaining agent for its fishermen members, required packers to buy fish only from "union" fishermen at prices set by a collective bargaining agreement. Although affiliated with the C. I. O. and including in its membership some of the fishermen's employees, the union, in this Court's view, was basically an association of businessmen. The crux of the decision is an examination of the independent and profit oriented

nature of the fishermen as opposed to wage earners. The Court observed that the fishermen were not the processors' employees; they owned or leased their boats "and carry on their business, uncontrolled by the petitioner or other processors." (315 U. S. at 145.) Moreover, their dispute with the processors concerned prices, the compensation of an entrepreneur, not wages. The Court held that membership of fishermen's employees in the union was not relevant:

"That some of the fishermen have a small number of employees of their own, who are also members of the Union, does not alter the situation. For the dispute here, relating solely to the sale of fish, does not place in controversy the wages or hours or other terms and conditions of employment of these employees." (315 U. S. at 147.)

The description of the fishermen in the district court's decision in *Columbia River*\* is a worthwhile comparison to many of the small orchestra leaders who, like Arthur Flatte, have other daytime occupations:

"The fishermen in this case were not employed by plaintiff in the sense of employment as meant by the Norris-LaGuardia Act. Their time was their own, many of them following other occupations out of fishing season. Some were farmers, many did not fish regularly, but only when the prices and run were satisfactory. All provided their own boats and gear, either as owners or lessees, the value of the boats and gear running from one hundred dollars to fifteen thousand dollars. Some owning the larger and more valuable boats were themselves employers, hiring others to fish for them." (34 F. Supp. at 976.)

The *Columbia River* decision turns primarily on the mercantile nature of the fishermen's occupation and the fact that the dispute concerned a commercial matter, the

---

\* *Columbia River Packers Assn. v. Hinton*, 34 F. Supp. 970, 976 (D. Ore., 1939).



price of a commodity. Both the district court and this Court emphasized the distinction between wage earners banded together in a union and a combination of individuals whose products or services were sold to the public for a price on a profit and loss basis.

A similar holding is found in *Ring v. Spina*, 148 F. 2d 647 (2d Cir., 1945). There, the Dramatists Guild, an organization of almost every playwright in the country, established a body of rules not unlike those in question here. Producers and managers who purchased plays could not do so unless they were "in good standing" with the Guild. All transactions were covered by the "Basic Agreement" which fixed minimum prices, minimum advances and royalties. The Agreement also forbade outright sale of plays to radio or television before stage presentation and established mandatory arbitration. The Guild president described the Basic Agreement as "a minimum collective bargaining agreement . . . designed to produce a fair return for the labor of its members who write plays for a living." (148 F. 2d at 651.)

The Court of Appeals rejected this characterization of the agreement and the claim that the conduct was exempt on three grounds: First, there was no employer-employee relationship:

"... while the parties to the dispute may not always be employers and employees, yet the exception will not apply unless an employer-employee relationship is 'the matrix of the controversy'." (148 F. 2d at 651.)

The court found that authors were more like the fishermen in *Columbia River* or the doctors in the *AMA* case\* than employees banded together in a union, since they were not employed by the producers. Second, the prices and royalties paid by producers for plays were not wages, but

\* *American Medical Association v. United States*, 317 U. S. 519 (1943).



rather were the terms of sale of a finished product. Finally, "no wages or working conditions of any group of employees are directly dependent on these terms." (148 F. 2d at 653.) The situation was thus similar to that involved in the instant case: Leaders, like the authors in *Ring*, sell services, and many of the union regulations concern not an employer-employee, but a seller-buyer, relationship in which leaders, as sellers, compete for the patronage of music purchasers in the club date field.

A more recent decision following the *Ring* thesis is *Taylor v. Local 10, International Union of Journeyman Horseshoers*, 353 F. 2d 593, (4th Cir., 1965.) Plaintiffs were trainers and owners who sued to enjoin price fixing and boycotts of trainers who did not use union farriers. The restraints were initiated by a union whose membership consisted of independent horseshoeing contractors. The defendants admitted that their conduct violated the Sherman Act, but contended that they were exempt under Sections 6 and 20 of the Clayton Act and the Norris-LaGuardia Act. There, as here, a labor organization had instituted the restraints on behalf of its members, and, therefore, the court was required to determine whether the union members were employees of trainers for purposes of the "labor dispute" test or whether, as in *Ring* and *Columbia River*, the members were independent contractors. The court first examined the basic agency question of the extent to which the trainers controlled the shoeing process, then turned to the indicia of business enterprise which belied the farriers' claim of employee status. Farriers themselves controlled when they worked and for whom; they owned their tools and transporting vehicles; they advertised, extended credit, and employed apprentices. Moreover, the court found that the farriers and trainers in the ordinary course of trade regarded the relationship as one of independent contractor and customer. The Court of Appeals therefore concluded

that the controversy was not a "labor dispute" within the judicial interpretations of the Norris-LaGuardia Act.

The argument is advanced that the labor exceptions protect certain agreements with non-labor groups, even if a restraint of trade incidentally results. This Court, in *United Mine Workers v. Pennington*, 381 U. S. 657 (1965), seems to have answered that question. The subject of the collective bargaining agreement in question was wages, probably the most basic of legitimate union concerns. However, the purpose and effect of the agreement was to impose such wages on other employers, thereby eliminating them from the field. This created the violation of the Sherman Act, notwithstanding the obvious benefit to the union.\* The contract, in the opinion of Mr. Justice White, was indistinguishable from a union induced agreement with the producers to set prices or a collusive bidding arrangement. The restraint in such situations would be direct, the benefit to the union would be at best remote. Conversely, a legitimately negotiated wage increase directly benefits the union, but the resulting effects on the product market from increased costs do not warrant Sherman Act proscription in absence of a conspiracy with businessmen who, as in *Pennington*, would profit by the increase.

This Court made it clear that there is no *carte blanche* exception, even with respect to mandatory subjects, where the combination between the union and businessmen restrains trade to the benefit of the employers. Thus, the elimination of competitors outside the bargaining unit by agreement with the union was held to violate the antitrust laws. The concurring opinion in *Pennington*, while it dis-

---

\* See also, *Philadelphia Record Co. v. Manufacturing Photo-Engravers Assn. of Philadelphia*, 155 F. 2d 799 (3rd Cir., 1946) involving the use of the union interest in hours of work to restrain trade outside the context of a labor dispute.

agreed with certain aspects of the majority decision, found that *Allen-Bradley* applied when "organized labor joined hands with organized business to drive marginal operators out of business." (381 U. S. 674.) Both the majority and concurring opinions assumed an economic benefit to the large operators from the elimination of their smaller competitors outside the agreement.

In the present case, the economic benefits from union membership and participation or acquiescence in union established industry rules are obvious. The benefits accruing to certain orchestra leaders are not necessarily *Pennington*-type predatory restraints in the elimination of competing leaders. The benefit to the non-labor group in the live music industry is the elimination of competition, rather than competitors; but the consequences for the purposes of antitrust policy are identical.\* Moreover, in the club date segment of the industry, one cannot speak of respective benefits in a collective bargaining context, because the rules of the combination forbid bargaining. The commercial restraints previously noted occur as a result of union fiat and leader agreement or acquiescence without any trace of the arms-length employer-employee interchange contemplated by the national labor policy.

---

\* See also, *United Brotherhood of Carpenters and Joiners v. United States*, 330 US 395 (1947). In *Lumber Products Association, Inc. v. United States*, 144 F. 2d 546, 549 (9th Cir., 1944) the court held that the indictment charged restraint of trade not "merely incident to . . . a protracted labor-dispute and necessary to the achieving of a legitimate objective of organized labor." The restraint was the result of a union management combination agreeing to use the union's power to destroy competition, give the employer a monopoly, and thereafter "split the take." Cf. *Adams Dairy Co. v. St. Louis Dairy Co.*, 260 F. 2d 46 (8th Cir., 1958) where a wage increase in a contract with a union negotiated at arms length incidentally increased the cost and price at which the plaintiff could sell milk in the St. Louis area.

## V.

**THERE IS NO PRACTICAL OR-REAL JOB OR WAGE COMPETITION OR OTHER ECONOMIC INTERRELATIONSHIP BETWEEN LEADERS AND SUBLEADERS OR SIDEMEN.**

The justification advanced by defendant unions for the horizontal restraints of trade agreed upon under their direction is that leaders are in job and wage competition with sidemen and subleaders. The argument is made that labor organizations have a legitimate interest in protecting their members, and that the various restraints are instituted in furtherance of that interest. The argument assumes, however, that leaders can and do displace their employees who, but for the leader's presence on the stage, would be employed in the leader's stead. The District Court's finding that leaders displace subleaders and sidemen (241 F. Supp. at 872) is clearly erroneous on this point. To accept the displacement thesis, one must ignore the economic realities of the live music industry and the unique function of the leader as the operating head of his enterprise. The live music industry has certain peculiar characteristics not usually found in other fields. One of these peculiarities is that, in most cases, the success of the orchestra as a commercial venture is personal to the leader. The purchaser of music usually neither knows nor cares about the identity of the sidemen or the details of providing music. He has hired the orchestra on the basis of the leader's skill and reputation and depends solely upon the leader to put together and present the engagement. *Cutler v. United States*, supra, 180 F. Supp. at 362, 363.

Judicial interpretation of business conduct and its anti-trust consequences has always been marked by an attitude of pragmatism. The practical effect of the activity in ques-



tion on antitrust policies and objectives has been considered the critical factor in determining its legality. For example, in considering whether a particular activity affected interstate commerce for Sherman Act purposes, this Court noted:

“Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.” (*Swift & Company v. United States*, 196 U. S. 375, 398 (1905).)

And in holding that the private legal obligations of a transaction could not govern its antitrust consequences, this Court said:

“Here we have an antitrust policy expressed in Acts of Congress. Accordingly, a consignment no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy.” (*Simpson v. Union Oil Company*, 377 U. S. 13, 18, 1964).

Here, the theory of job or wage competition between leaders and their employees is a technical rather than a practical concept when taken in the light of Congressional objectives in the antitrust laws and the Clayton Act exemption. The theory ignores not only the necessary role of the leader in the continued success of the business, but also the true relationship between the leader, his employees, and the purchaser of music. It is obviously impossible to assert that never, at any time or in any place will a situation exist where a leader displaces a sideman or subleader. Such situations, in an industry whose hallmark is lack of uniform industry practice, may occur from time to time. However, defendant unions have the burden of proof in claiming the benefit of an exemption from the antitrust laws, and they have failed to meet that burden. *Javierre v. Central Altagarcia, Inc.*, 217 U. S. 502, 507 (1910); *United States v. McKesson & Robbins*, 351 U. S. 305, 310



(1956). The extensive hearings produced no evidence that any leader really displaced or threatened to displace an employee just to avoid a union wage scale or similar union benefit. The occasional practice of some leaders using sub-leaders when they are unable to be present cannot be said to create a threat of employee displacement in the industry. The defendants must demonstrate a practical state of job and wage competition (or other economic relationship) between individual leaders and their employees for the funds expended by the purchaser of music. The pragmatism which governs antitrust policy, and for that matter the protection of unions by the Clayton Act, demands more than an abstract or theoretical concept of economic relationship between leaders and subleaders or sidemen.

In drawing the line between entrepreneur and employee, we do not imply that there are no situations where an independent contractor does not come within the Clayton Act exemption. The Supreme Court in *Columbia River* specifically distinguished the case before it and its holdings in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552 (1938)\* and *Milk Wagon Drivers Local 753 v. Lake Valley Farm Products, Inc.*, 311 U. S. 91 (1940), "for in both cases the employer-employee relationship was the matrix of the controversy" (315 U. S. at 147). In *Milk Wagon Drivers*, the so-called "vendor" drivers were treated by their contract with the dairies as employees and the contract so stated. Moreover, the "vendors", although independent contractors in that they owned their own vehicles, were in fact displacing union dairy employees, thus creating direct job competition in milk deliveries from which the union sought to protect its members. This Court, on those facts, found a "labor dispute".

---

\* *New Negro Alliance v. Sanitary Grocery Co.* was not an anti-trust case, but involved the anti-injunction provisions of the Norris-LaGuardia Act.

The fact situation in *Local 24, IBT v. Oliver*, 358 U. S. 283 (1959) is similar to *Milk Wagon Drivers* and, therefore, is not analogous to the instant case. Article 32 of a collective bargaining agreement governed wages and rentals in situations where the carrier leased a vehicle which the lessor also drove. The article, by its terms, made the lessor/driver an employee of the carrier who retained control over the manner and details of his performance. The article provided that the driver must receive union wages and that the rental of the vehicle could not be less than its operating cost which would, in effect, lower the wages of the lessor/driver below union scale. The Court held that Article 32 in fact dealt with wages, a mandatory subject of collective bargaining. As the Court observed, Article 32 was limited specifically to situations where the lessor drove his own vehicle; it did not apply when the driver leased a vehicle, but someone else drove. The evidence showed that owner/driver leasing had been abused by the carriers as a method of lowering the effective wage structure. The Court also observed that this was "of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service." (358 U. S. at 294.) Finally, unlike the AFM rules, the agreement in *Oliver* did not attempt to negotiate a profit for the owner-driver, a matter outside the union's responsibility. In *Oliver* and *Milk Wagon Drivers*, the independent contractors stood in an "employee" relationship to the employer of their services, because in both cases, the independent contractor could and, in fact did, perform the very duties ordinarily assumed by the company's regular drivers. In both cases, independent contractor indicia were outweighed by detailed evidence that the contractor had actually assumed an employee status. Moreover, because the job in question, i.e., driving a truck, could be

performed by either a contractor or a regular employee, there existed an economically real danger of job displacement.

The relationship between the orchestra leader, his sidemen and the music purchaser is totally different than that of drivers to carriers or dairies. It is true that in rare instances a leader may hire a subleader to perform in his absence. Carroll and Petersen were forced to do this because of union pressure on their sidemen and purchasers when they were expelled from the AFM. But these are exceptions; most orchestras simply do not exist without the leader. His skill and reputation create jobs for his employees, but none of them can really replace him. At the top of the club date field are the so-called "name bands", such as Stan Kenton. (384-440.) The dependence of these bands on the "name" leader is obvious. As an abstract proposition, one could argue that these name leaders, when conducting or playing an instrument, are filling a job requirement that could be filled by any other subleader or sideman and therefore displace potential employees. It is obvious, however, that these leaders become and remain "names" by their continual presence at the head of their bands, and the purchaser who pays for Stan Kenton will be greatly dissatisfied with an unknown subleader.\*

There are, however, many leaders whose reputations are not nationwide, but who, nonetheless, have built a reputation among customers and potential customers in a small geographic area. Many of them advertise or depend upon word of mouth and repeat business from satisfied customers. On a much lesser scale, these leaders are "names"

---

\* A few large organizations such as Myer Davis book a number of engagements simultaneously and therefore must use subleaders. (351; 357-358; 363.) Davis himself, however, personally conducts a "first string" orchestra for certain single engagements. Such organizations are rare in New York and are virtually unknown elsewhere in the country.

in the sense that they cannot substitute an unknown sub-leader or sideman for themselves. The purchaser, even when he contracts with the leader of a small band, expects that the music he is buying will be played under the direct, on-stage supervision of the leader and with the conducting and/or instrumental skill of that leader. The potential for an employer to substitute an independent contractor for an employee performing the same function is not comparable to the hypothetical potential for displacement of a subleader or sideman by a leader.\* The Court of Appeals recognized this when it observed that the "contracting out" problem in *Oliver* did not exist in the club date field:

"The circumstances constituting a possible threat to the employment of subleaders or the displacement of a sideman in the present case are not at all comparable. . . .

"Moreover, many leaders become so because of their skill and reputation in playing certain instruments and their performance with their orchestras enhance the demand for the orchestras and provide more work for employees rather than less as is the case of "contracting out." (372 F. 2d at 166, emphasis supplied.)

But the Court of Appeals would not apply these facts, by which it found a *per se* violation of the Sherman Act in the price-fixing issue, to the broader questions in this case. As noted previously, the court had to find an agreement to find a price fix, and it had to find that leaders were busi-

---

\* On the opposite end of the spectrum from the name band is the sideman who, two or three times a year, at the request of friends or relatives, gathers a few sidemen and, for an evening is an orchestra leader. These are clearly not professional leaders and admittedly are not entrepreneurs in the sense that we have used that term. However, assuming, as did the District Court (Finding 35) that such persons compete on occasion with full-time leaders, they have entered the commercial arena and are no more entitled to union price protection when they temporarily act as businessmen than are full time entrepreneurs. Like the seasonal fisherman in *Columbia River*, the sideman who bids for an engagement as a leader temporarily becomes a seller, not a wage earner.



nessmen, because only businessmen are compensated by a price; employees are paid wages. If the orchestra leader is an employer and businessman, and if the leader does not represent a "contracting out" danger which would exempt price fixing, it follows that leaders should not be union members. For union membership by leaders is tantamount to their joining a horizontal combination to restrain trade in a variety of competitive aspects of their respective businesses.

With respect to this broader issue, the most significant decision is *Los Angeles Meat & Provision Drivers Union v. United States*, 371 U. S. 94 (1962) because there the sole question before this Court was the validity of a lower court decree ordering the union to terminate the membership of all self-employed "grease peddlers". The antitrust responsibility for various union practices had already been disposed of below, so the issue of union membership was more or less a "pure" one; that is, no questions of the relationship of particular union practices to "terms and conditions of employment" were involved.

Grease peddlers were self-employed middlemen whose profit derived from the spread between the cost of restaurant grease and the price at which it was resold to processors, less such costs as operating their trucks. In 1954, at the instigation of a union business agent, most of the grease peddlers in Los Angeles joined the union for the purpose of fixing an increased spread between the cost and sale prices of grease. These prices were enforced by union officials who threatened strikes and boycotts against processors who dealt with non-union peddlers. The business agent allocated territories and customers among the peddlers, who agreed not to solicit each others' customers. Violations of the agreement were punishable by suspension of the offending peddler from the union, which would effectively prevent the peddler from carrying on his business.



This Court held that there was no showing of job or wage competition between the contractors and the processors' employees in picking up grease. The stipulation between the parties stated that no processor had ever substituted a contractor for an employee or ever threatened to do so. The processors' employees obtained grease from large restaurants and hotels; essentially different sources than those of the contractors.\*

The district court had ordered termination of the grease peddlers' union affiliation because that remedy was "the most effective, if not the only, means of preventing a recurrence of defendants' unlawful activities". There was no question, in this Court's view, that a court of equity had the power to dissolve a trade association being used as a forum for a conspiracy to violate the antitrust laws. This Court held that the "simple expedient of calling themselves 'Local 626-B' of a labor union" would not immunize these businessmen from the operation of the Sherman Act. As in *Columbia River*, the grease peddlers, as sellers of a commodity, had joined the union to effectuate an unlawful combination. This was not a *Milk Wagon Drivers* or *Oliver* situation where the union might have a legitimate interest in the membership of self-employed entrepreneurs. The circumstances before this Court were not those of a "labor dispute", but rather "an illegal combination between businessmen and a union to restrain commerce." (371 U. S. at 102.)

*United States v. Fish Smokers Trade Council, Inc.*, 183 F. Supp. 227 (S. D. N. Y., 1960) involved the question of severing independent contractors from union membership.

\* The opinion also noted that the independent contractors were treated separately within the union, but this does not appear to have been the determining consideration in the opinion. The result would not have been different if the price fixing, customer allocations, and boycotts had been agreed upon by the union and peddlers within the general membership of the organization.

The smokehouses sold fish to jobber wholesalers who, in turn, sold to retailers. Some of the smokehouses also had their own retail customers and employed "chauffeurs" for such deliveries. The complaint asked injunctive relief "directing the defendant union to sever or expel from membership all jobbers engaged in the buying and selling of the fish for their own account." (183 F. Supp. at 229.) The issue before the court was whether the jobbers constituted a "labor group" which competed with the chauffeurs and affected their wages, hours and conditions of employment. The court noted that no such effect was shown to justify forcing the jobbers to be union members. The jobbers, although they picked up and delivered fish, also chose which smokehouses they would purchase from, which fish they would select for their customers and the price and profit at which they would sell to their retail customers. The jobbers extended credit and suffered the loss of non-payment. They worked their own hours and employed "helpers" to assist them in their work. The court found that there was no evidence of a vendor system to avoid union scales as was the case in *Milk Wagon Drivers*:

"While a jobber and a chauffeur employee perform identical physical work, one has sole discretion in the performance of this work while the other just follows his employer's orders." (183 F. Supp. at 231.)

The court concluded that "there was no competition in any respect between the chauffeurs and the jobbers . . . although the physical aspect of the work of these two groups are similar, 'the economic and social difference between them lies in the method of compensation in return for their toil.' *People v. Distributors Division*, 169 Misc. 225, 7 N. Y. S. 2d 185, 187." (183 F. Supp. at 235.) So here, the economic and social differences between leaders and subleaders or sidemen, not the marginal similarities

of their physical work, ought to determine the validity of the job and wage competition defense.

In the instant case, the regulation of purely business functions by the unions in combination with the leaders can be effectively corrected only by the termination of leaders from union membership. A limited remedy, well within the *Los Angeles Meat Drivers* and *Fish Smokers* decisions, would separate the businessmen from the union and would leave to the parties the ordinary labor-management methods of solving their labor disputes.

### CONCLUSION.

The flaw in the Court of Appeals decision is that it stopped short. The court found, for purposes of the price fixing issue, all the elements of the *Los Angeles Meat Drivers* and *Columbia River* situations. The court noted all the factors that make leaders entrepreneurs, that eliminate the job competition justification, and the benefit which leaders derived from the union's price fixing rules. But restraints of other types and restrictions on competition among leaders inherent in their union membership were treated in completely different manner. If orchestra leaders are businessmen, they should not be union members.

Respectfully submitted,

SHAYLE P. FOX,  
LAWRENCE M. COHEN,  
SAMUEL H. YOUNG,  
LAWRENCE H. EIGER,

*Attorneys for Amicus Curiae,  
National Association of Or-  
chestra Leaders.*



IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 309

AMERICAN FEDERATION OF MUSICIANS OF THE  
UNITED STATES AND CANADA, *et al.*,

Petitioners,

*vs.*

JOSEPH CARROLL, *et al.*,

Respondents.

No. 310

JOSEPH CARROLL, *et al.*,

Petitioners,

*vs.*

AMERICAN FEDERATION OF MUSICIANS OF THE  
UNITED STATES AND CANADA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

CROSS-PETITIONERS (PLAINTIFFS') BRIEF

GODFREY P. SCHMIDT,  
Attorney for Cross-Petitioners-Plaintiffs,  
100 West 42nd Street,  
New York, N. Y. 10036.

Tel.: 212-279-0355





## TABLE OF CONTENTS

---

	PAGE
Opinions Below .....	1
Jurisdiction .....	2
Statement of the Case .....	2
1. The Plaintiffs .....	2
2. The Defendants .....	5
3. The Musical Industry .....	5
4. Club Dates .....	6
5. Booking Agents and Sidemen .....	7
6. Professional Orchestra Leaders Compared With <i>Ad Hoc</i> Leaders .....	8
7. The "Form B" Contract .....	10
8. Defendant Unions and Collective Bargaining	11
9. Employer Status of Orchestra Leader .....	12
10. Special aspects of the orchestra leader's status as employer .....	14
11. Leaders and their Bands as appraised by Simon .....	21
12. The leader's modes of leading .....	24
13. The leader in relation to his sidemen .....	25
14. Booking Agents and Leader-Employers .....	27
15. The Big Bands yesterday and today .....	28
16. The different interests of leaders and side- men; their "competition" .....	29

	PAGE
17. Decrease in musicians' jobs .....	31
18. No competition between leaders below Union standards .....	31
19. Leader bidding against sidemen .....	32
Questions Presented .....	33
Statutes Involved .....	35
Summary of Argument .....	36

#### ARGUMENT:

##### POINT I—(Addressed to Questions 1, 3, 4 and 5)

The Union price-fixing (and other antitrust law violations) in these cases is largely effectuated by Union bylaws obligating all members, including orchestra-leader-employers. The latter are entrepreneurs, who as union members previously participated in formulation of Union prices (and other commercial restraints) at Union Price List Meetings. Those bylaws are enforced in combination with many types of businessmen (including such orchestra-leader-employers); and they necessarily involve, precisely because they are effective, agreement or combination among competing orchestra leaders and other businessmen, such as booking agents, for the purpose of preventing competition at prices below the minimum prices promulgated and enforced by the petitioning Unions .....

41

##### A. Nature of Union price tampering .....

41

##### 1. Price fixing by Unions and their version thereof .....

42

# TABLE OF CONTENTS

iii

	PAGE
2. The combination of Unions with non-labor groups .....	46
3. Unions allow no competition for musical engagements at prices below their minimum prices .....	50
B. Discussion of cases .....	51
C. Critique of certain passages in the opinion below .....	63
POINT II—(Addressed to Question 2)	
The restrictive Union practices of which plaintiffs complain are enforced and maintained by petitioning Unions in combination with non-labor groups. Therefore, they constitute antitrust law violations, whose resemblance to unfair labor practices is irrelevant .....	88
POINT III—(Addressed to Question 6)	
There is no relevant competition between professional orchestra leaders and their employee musicians .....	100
POINT IV—(Addressed to Question 7)	
Orchestra-leader-employers who function like cross-petitioners constitute a true class under Rule 23 (a) (1) FRCP; even though the professional orchestra leaders in that class constitute only a very small group within the petitioning Unions .....	103
Conclusion .....	105
Supplement .....	S-1

## TABLE OF CASES

	PAGE
Adams Dairy Co. v. St. Louis Dairy Co., 260 F. 46, 53 (8 Cir. 1958) .....	57
Allen Bradley Co. v. Local 3, International Brother- hood of Electrical Workers, 325 U. S. 797 (1945) .....	56, 57, 61, 63, 89, 104
Apex Hosiery Co. v. Leder, 310 U. S. 459 (1940) ....	54
Ball v. Paramount Pictures, Inc., 169 F. 2d 317 (3 Cir. 1948) .....	67
California Sportswear & Dress Association, 54 FTC 835 (1957) .....	58
California State Brewers Institute v. Teamsters, 1-A LRRM 661 .....	71
Carroll v. AFM, 206 F. Supp. 462 (S.D.N.Y. 1962), affd. 316 F. 2d 574 (2 Cir. 1963) .....	2, 50, 87
Coronado Coal Co. v. U.M.W., 268 U. S. 295 (1925) ..	52
Cutler v. AFM, 231 F. Supp. 845, aff. 316 F. 2d 546 (2 Cir. 1963), cert. denied 375 U. S. 941 (1963) ..	2, 92
Cutler Case, 164 N.L.R.B. No. 8 .....	91
Cutler v. U. S., 180 F. Supp. at 362-63 .....	3, 48
Davis Mills Corp. v. Federation of Dyers, 18 LRRM 11 CCH Labor Cases, 69698, 69704 (S.D.N.Y. 1946) .....	57
Dean v. Mayo, 9 F. Supp. 459 (D. C. La. 1934), affd. 82 F. 2d 554 (1934) .....	71
Doerner and Glasser Cases, 165 N.L.R.B. No. 110 ....	91
Donnelly Garment Co. v. International Ladies Gar- ment Workers, 21 F. Supp. 807 (D. C. Mo. 1937), reversed on jurisdictional grounds, 304 U. S. 243 (1938) and 20 F. Supp. 767 (D. C. Mo. 1937) ....	71
East Texas Motor Freight Lines v. International Brotherhood of Teamsters, 163 F. 2d 10 (5 Cir. 1947) .....	57
Feht Baking Co. v. Bakers' Union, 20 F. Supp. 691 (D. C. La. 1937) .....	71



# TABLE OF CONTENTS

V

	PAGE
Galveston Truck Line Corp. v. Ada Motor Lines, Inc., 35 CCH Labor Cases 97393 (W. D. Okla. 1959) ..	58
Grace v. Williams, 96 F. 2d 478 (Cir. 8, 1938) .....	71
Greenstein v. National Skirt & Sportswear Association, 178 F. Supp. 681 (S.D.N.Y.1959), appeal dismissed, 274 F. 2d 430 (2 Cir. 1960) .....	58
Gundersheimer's Inc. v. Bakery Workers, 119 F. 2d 205 (D. C. Cir. 1941) .....	55
Hawaiian Tuna Packers Ltd. v. International Long- shoremens Union, 72 F. Supp. 562 (D. Hawaii, 1947) .....	59
Hunt v. Crumboch, 325 U. S. 21 (1944) .....	38
Interstate Circuit Inc. v. U. S., 306 U. S. 208 (1939) .....	59, 67, 69
Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U. S. 211 (1951) .....	51
Local 167, I. B. T. v. U. S., 291 U. S. 293 (1934) ....	52, 54
Local 175, International Brotherhood of Electrical Workers v. U. S., 219 F. 2d 431 (6 Cir.), cert. denied, 349 U. S. 917 (1955) .....	59, 69
Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U. S. 676 (1965) .....	60
Los Angeles Meat & Provision Drivers Union v. U. S., 371 U. S. 94 (1962) .....	39, 59
Lystad v. Local 223, IBT, 135 F. Supp. 337 (D. Ore. 1955) .....	57
McHugh v. U. S., 230 F. 2d 252 (1 Cir.), cert. denied, 351 U. S. 966 (1956) .....	58
Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc., 311 U. S. 91 (1940) .....	52, 53, 54
Northern California Pharmaceutical Association v. United States, 305 F. 2d 379 (9 Cir. 1961), cert. denied, 371 U. S. 862 (1962) .....	67, 69
Oberman & Co. v. United Garment Workers Union, 21 F. Supp. 20 (D. C. Mo. 1937) .....	71

	PAGE
<b>Pauly Jail Building Co. v. International Association,</b> 29 F. Supp. 15 (D. C. Mo. 1939) .....	71
<b>Pevely Dairy Co. v. Milk Wagon Drivers Union,</b> 174 F. Supp. 229 (E. D. Mo. 1959), appeal dismissed, 283 F. 2d 519 (8 Cir. 1960) .....	58
<b>Philadelphia Record Co. v. Manufacturing Photo- Engravers Association,</b> 155 F. 2d 799 (3 Cir. 1946) .....	59
<b>Retail Food Clerks v. Union Premier Food Stores,</b> 98 F. 2d 821 (Cir. 8, 1938) .....	71
<b>Truck Drivers Local 421 IBT v. U. S.,</b> 128 F. 2d 227 (8 Cir. 1942) .....	55
<b>U. S. v. American Federation of Musicians,</b> 47 F. 2d 304 (N. D. Ill. 1942), affd. per curiam, 318 U. S. 741 (1943) .....	55
<b>U. S. v. Associated Plumbing &amp; Heating Merchants,</b> 38 F. Supp. 769 (W. D. Wash. 1941) .....	55, 56
<b>U. S. v. Bay Area Painters &amp; Decorators Joint Comm., Inc.,</b> 49 F. Supp. 733 (N. D. Cal. 1943) ..	55
<b>U. S. v. Brims,</b> 272 U. S. 549 (1926) .....	51, 52, 54
<b>U. S. v. Building &amp; Construction Trades Council,</b> 313 U. S. 539 (1941) .....	55
<b>U. S. v. Carrozzo,</b> 37 F. Supp. 191 (N. D. Ill.), affd. per curiam sub. nomine .....	55
<b>U. S. v. Employing Lathers Association,</b> 347 U. S. 198 (1954) .....	59
<b>U. S. v. Employing Plasterers Association,</b> 347 U. S. 186 (1954) .....	59
<b>U. S. v. Fish Smokers Trade Council, Inc.,</b> 183 F. Supp. 227 (S.D.N.Y. 1960) .....	58, 59, 69
<b>U. S. v. Gasoline Retailers Association,</b> 285 F. 2d 677 (7 Cir. 1961) .....	58
<b>U. S. v. Hamilton Glass Co.,</b> 155 F. Supp. 878, 884 (N. D. Ill. 1957) .....	57, 58

# TABLE OF CONTENTS

vii

	PAGE
U. S. v. Hutcheson, 312 U. S. 219 (1941) .....	54, 55
U. S. v. International Fur Workers Union, 100 F. 2d 541 (2 Cir. 1938), cert. denied, 306 U. S. 653 (1939) .....	56
U. S. v. International Hod Carriers District Council, 313 U. S. 539 (1941) .....	55
U. S. v. Milk Wagon Drivers Union, 153 F. Supp. 803 (D. Minn. 1957) .....	57, 59, 69
U. S. v. Minneapolis Electrical Contractors Associa- tion, 99 F. Supp. 75 (D. Minn. 1951) .....	58
U. S. v. New York Electrical Contractors Association, 42 F. Supp. 789 (S.D.N.Y. 1941) .....	55
U. S. v. United Brotherhood of Carpenters, 313 U. S. 539 (1941) .....	55
U. S. v. Womens Sportswear Manufacturers Associa- tion, 336 U. S. 460 (1949) .....	59
United Brotherhood of Carpenters v. U. S., 330 U. S. 395 (1947) .....	60
United Mine Workers of America v. Pennington, 381 U. S. 657 (1965) .....	60
United States v. Masonite Corp., 316 U. S. 265 (1942)	67
Vaca v. Sipes (87 S. Ct. 903, 914-915) .....	72
Waterfront Employees of Portland v. C.I.O., 1-A LRRM 568 .....	71
Westlab Inc. v. Freedom Land, Inc., 198 F. Supp. 701 (S.D.N.Y. 1961) .....	57

## STATUTES INVOLVED

Sherman Antitrust Act. Act of July 2, 1890, c. 647, 26 Stat. 209; 15 U.S.C.A. §§ 1-7; as amended	35, passim
Clayton Act. Act of October 15, 1914, c. 323, 38 Stat. 730, as amended .....	35, passim
Norris-LaGuardia Act § 6, 47 Stat. 71 (1932), 29 U.S.C. § 106 (1964) .....	59



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1967

---

No. 309

AMERICAN FEDERATION OF MUSICIANS OF THE  
UNITED STATES AND CANADA, *et al.*,

Petitioners,

*vs.*

JOSEPH CARROLL, *et al.*,

Respondents.

---

No. 310

JOSEPH CARROLL, *et al.*,

Petitioners,

*vs.*

AMERICAN FEDERATION OF MUSICIANS OF THE  
UNITED STATES AND CANADA, *et al.*,

Respondents.

---

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

---

**CROSS-PETITIONERS (PLAINTIFFS') BRIEF**

---

**Opinions Below**

The Opinion (App. 124) of the United States District Court for the Southern District of New York is reported at 241 F. Supp. 865. The majority and minority opinions (App. 180, 203) of the United States Court of Appeals for the Second Circuit are reported at 372 F. 2d 155.



## Jurisdiction

Judgment of the Court of Appeals (Second Circuit) having been entered on January 30, 1967, Cross-Petitioners invoked jurisdiction under 28 U.S.C. § 1254 (1). The Order allowing certiorari was dated October 9, 1967.

## Statement of the Case

1. *The Plaintiffs.* Somewhat inadequately, the plaintiffs are described in the District Court's opinion (App. 125-27). More comprehensive descriptions of the manner in which plaintiffs, like other professional orchestra leaders, conduct their businesses and professions appears in the opinions of the same District Court in *Cutler v. AFM*, 231 F. Supp. 845, affirmed 316 F. 2d 546 (2 Cir. 1963), certiorari denied 375 U. S. 941 (1963) and in *Carroll v. AFM*, 206 F. Supp. 462 (S.D.N.Y. 1962), affirmed 316 F. 2d 574 (2 Cir. 1963). As appears from these decisions and from the instant record, orchestra leaders like plaintiffs are employers, even though AFM and its Locals regard them as "employees" (Tr. 62-64, 353-86, 993, 1038-45) of the purchasers of music. They are businessmen (Tr. 150-151) who operate enterprises for profit in competition with other orchestra leaders. Although they are entrepreneurs, they are subject to Union rules (Tr. 8, 84) and practices (Tr. 277-278, 237-238, 58-60) which largely govern them, not merely as employers but as entrepreneurs, as will be demonstrated *infra* in the argument. But the leader is a businessman-employer who is distinguished from other such employers because his success is particularly dependent upon his own personality, skill, business acumen and showmanship (Tr. 150-151, 1026, 1030, 1034-1035, 1037-1038). The popularity of his orchestra depends upon his leadership, style and reputation and not upon any individual sideman, i.e., instrumentalist employed by orchestra leader.

When the leader plays an instrument (as he usually does), he does not displace any sidemen. On the contrary, he thereby makes possible jobs for sidemen. Purchasers of music are utterly indifferent to the names and even reputations of sidemen, as the court found in *Cutler v. U. S.*, 180 F. Supp. at 362-63. Only the orchestra leader makes an investment in the orchestra's music library, music stands, uniforms, lighting equipment, sound systems, stationery and other paraphernalia. He alone assumes the risk of loss if the purchaser fails to pay after the engagement. The orchestra leader alone decides whether credit shall be extended. If he guesses wrong, the leader must nevertheless pay the wages of his sidemen (Plaintiffs' Exhibit 162, Article 13 § 29). The purchaser looks to the leader to perform the contract of engagement and not to any sidemen (*ibid.* Article 16 § 19). The leader hires his sidemen, disciplines or discharges them and exercises complete control as any employer, but he does so not only from an economic point of view but also from an artistic one (App. 7-8, 102).

Plaintiffs (and members of the class they represent) do not confine their activity and business to any particular types of orchestral engagements; although most of their business does derive from the single engagement field described below. They seek engagements and perform services wherever job opportunities, within their competence, exist (App. 129-30; Tr. 1160; 2154-57, 2159-65, 2829-30, 3291-96).

The contrast between App. 102, ¶ (10),\* and App. 126-27, § 11,\* highlights the tremendous difference between

---

\* The Pretrial Order (App. 102) contains the following stipulation (10):

(10) The vast majority of members of defendant unions who act as orchestra leaders do not devote their full time to the profession of orchestra leader. They also serve as sidemen; they

(Footnote continued on following page)

*professional* orchestra leaders like plaintiffs and the "vast majority of members of defendant unions who act as orchestra leaders." Leaders like plaintiffs are small in number, less than 2% of AFM and Local membership. Compare, for example, Tr. 212 and 3661-62 with Tr. 3667. Max Arons, then Secretary and now President of Local 802, variously estimated that, out of six to ten thousand members who filed contracts as leaders, only 120 (on one estimate) or 2% (on another estimate) were professional orchestra leaders like plaintiffs, who never worked as sidemen (App. 130, ¶ 33; Tr. 3666-7; Plaintiffs' Exhibit 58).

Thus, the class represented by plaintiffs is very small by comparison with the members who, though usually sidemen, do nevertheless, occasionally and on an *ad hoc* basis, file engagement contracts as "orchestra leaders"; and who, thereupon, *improvise* (rather than *establish*) orchestras. The class asserted by plaintiff includes only *professional* orchestra leaders; that is to say, employers who derive their livelihoods from their profession and who never or

---

(Footnote continued from preceding page)

maintain no office; they do not employ steady or part-time employees; they do not advertise; they do not use the same sidemen from one engagement to another; they do not use subleaders; they do not call for rehearsals or train their orchestras; and they do not furnish music, bandstands or uniforms. They are musicians who may lead today and may follow tomorrow.

By contrast, the Trial Court found (correctly but not fully) that:

11. The plaintiffs in practicing their professions:

(a) maintain their own offices where they employ steady and/or part-time employees (567; St. Min. 71, 76-81, 258-59, 347, 360);

(b) acquire business as a result of their own contacts, reputations, and personal solicitations (567; St. Min. 78-79, 261-62, 360);

(c) engage in and pay for advertising (567; St. Min. 80-85, 87, 127-128, 261-262, 360) and prominently display their names wherever their engagements are played, thus indicating that the orchestra is, e.g., the Charles Peterson Orchestra (St. Min. 116, 260, 347).

very rarely work as sidemen, and then only to accommodate fellow leaders.

2. *The Defendants.* The defendants are adequately described in the pretrial order (App. 101) and in the District Court's opinion (App. 127-28).

The geographical area over which AFM exercises jurisdiction includes the entire United States, Canada, Puerto Rico, the Virgin Islands and the high seas (Plaintiffs' Exhibits 155-156, 348; Tr. 516). The geographical area over which Local 802 exercises jurisdiction comprises the five boroughs of the City of New York and Nassau and Suffolk Counties in New York. But in many respects AFM and Local bylaws are binding on members, wherever they travel (Tr. 266; 286-289) and even on AFM members from other States who visit Local 802's geographical area (Tr. 275; Plaintiffs' Exhibits 155, 156, 348).

Membership in a Local affiliated with AFM implies AFM membership (App. 101). Defendants are and claim to be *representatives* within the meaning of NLRA of both employee-musicians and orchestra-leader-employers, including plaintiffs (Tr. 2984-95).

Practically all orchestra leaders (except Carroll and Peterson who were erased as members after the instant actions were begun) and all sidemen in the United States are AFM members (Tr. 164-65; App. 102). Some orchestra leaders are members of two or more AFM Locals: e.g., Meyer Davis (Tr. 349 ff), Ruby Newman (Tr. 800 ff), Marty Ames (Tr. 931 ff), Stan Kenton (Tr. 1021 ff) and Si Zentner (Tr. 3505).

3. *The Musical Industry.* There is a wide variety of types of musical engagements (Tr. 28; Plaintiff's Exhibit 187, Index). These defendants have divided them into two classes: single engagements and steady engagements (App. 128, ¶ 24; Article 10, Exhibits 29, 165, 172; Article 15, Ex-

hibit CM). The total of single and steady engagements comprises all musical events in the United States according to Union categories. A single engagement is defined by the Local 802 Bylaws (Article 10, Exhibits 29, 165-172) as an engagement of less than one week or five days. A steady engagement is an engagement of five days or more (App. 101, ¶ 8; App. 128, ¶ 24). The complaints and the proof cover both single and steady engagements.

AFM has made a similar distinction between "traveling engagements" which are defined as "engagements of one week or more played by members outside the jurisdiction of their home Local and all tours of one week or more"; and "miscellaneous out-of-town [traveling] engagements" which are defined as "all engagements of less than one week played by members outside of the jurisdiction of their home Local" (Article 15 of Exhibits 161, 162, 163, 164, 164A, 164B and CM).

There is no legally, musically or factually significant difference between the function or activity of an orchestra leader in the single engagement field and his function or activity in the steady engagement field (Tr. 524-25, 578-79, 713-16, 864, 984, 1054-56, 1182-83, 1335-36, 2508, 3528-36).

4. *Club Dates*. The class of *single engagements* includes, and therefore is larger than, the class of *club dates* (Tr. 275, 350-51, 462, 539, 211, 559-60, 3841-42, 3886; Exhibits 187 and 366). Exhibit 365 (Tr. 3784) purports to be a Union tabulation of 48, 460 "club date single engagements" for the year 1961, nomenclature of which plaintiffs never heard prior to that year. A Union official testified that 55,000 contracts for musical engagements were filed with Local 802 in one year (Tr. 476). About 30 Local 802 delegates visit the locations of musical engagements to check on them (Tr. 3834). Sometime earlier (March, 1962) the number of such delegates was approximately 20 (476, 484-86).



The non-club date field includes all steady engagements and many single engagements (Tr. 3830-31, 3841). Steady engagements in the musical industry in the United States are rare and very small in number (Tr. 350-51, 2984-94, 3108-09, 3183-3230, 3241, 3582, 3659-60). Except for employee musicians working for professional orchestra leaders as first string or second string men, employment in the single engagement field is highly casual; it is often performed by persons whose primary source of income is derived from other occupations entirely outside of the field of musical entertainment (Tr. 3654, 3661, 3666-67, 3673). Local 802 in its own statistical tabulations (Exhibits J, L, M) admits that more than half of all "club date" engagements are played by less than 5% of Local 802 members. About 2% of Local 802 membership are full-time professional orchestra leaders (Tr. 1689-93). In other words, the bulk of all musical engagements and the largest part of income from such engagements comes from single engagements (Tr. 350-51, 3888).

The Index of the Local 802 Price List revised as of June, 1959 (Exhibits 187, 366) lists approximately 127 types of single engagements and 65 types of steady engagements. (It does not describe "club dates".) But that Price List booklet did not include (as it states on its cover) electrical transcriptions, motion picture recordings, steady opera, recordings, steady symphony work, television, theatre and wired music engagements. These are covered by other booklets published by AFM and Local 802.

5. *Booking Agents and Sidemen.* Many engagements are obtained for well-known leaders by means of the services of booking agents (Tr. 130, 555, 1022, 1039, 1042, 1083, 1101). Professional orchestra leaders are either internationally known, nationally known, regionally known, locally known or relatively unknown despite a genuine following which enables them to earn their livelihoods as leaders (Tr. 3540-44, 3566-67, 552-53, 794-96, 1093-96, 1118,

1269). The sideman who wants to break into the class of orchestra leaders has to do what most established orchestra leaders did in the past. He has to build up a following and a reputation by reason of his virtuosity, his business acumen, his personality, his capacity for leadership and his ability to stamp his orchestra with a style of performance that merits popularity.\* Booking agents don't deal with sidemen (Tr. 528-531).

6. *Professional Orchestra Leaders Compared With Ad Hoc Leaders.* Orchestra leaders with national or international reputations (Tr. 2540-3544, 1071, 1086, 794-96, 1118) and orchestra leaders with regional reputations, extending across state lines (Tr. 3543, 3566-67, 444, 450, 794-96, 1118-1119, 1130-31) conduct their business and their orchestras in the same way (leaving aside such factors as are personal) as orchestra leaders who are only locally known and who do not regularly cross state lines (Tr. 984, 1076). They must be differentiated, however, from the vast majority of the eight to ten thousand members, who, according to Local 802 officials, filed contracts or reports of engagements with Local 802 for the year 1960 (Tr. 3667).

Leaders and sidemen are readily interchangeable in the vast majority of this number of 8,000-10,000. But sidemen are certainly not interchangeable with professional orchestra leaders having established businesses. Purchasers of music would and do reject such interchangeability. Even if they did not object, obviously no sideman-turned-leader *ad hoc* can suddenly put himself into the boots of an established *professional orchestra leader*. There is a definite group of AFM sidemen who are primarily sidemen and who make a profession of being sidemen and who derive their livelihood from performing as sidemen (Tr. 1205 ff, 1395 ff). Likewise, there is a small class of orchestra-

---

\* See the recently published volume "*The Big Bands*" by George T. Simon which treats of the orchestra leaders (including plaintiff, Cutler) who were, and some of whom still are, at the top of their profession.

leader-employers who, like plaintiffs, have established businesses as such, who earn their livelihood from serving as leaders and who never or very rarely perform as subleaders or as sidemen, doing so only as an accommodation for a fellow leader: Meyer Davis (Tr. 3049 ff), Hank Thompson (Tr. 779 ff), Ruby Newman (Tr. 800 ff), Marty Ames (Tr. 937 ff), Stan Kenton (Tr. 1021 ff), Si Zentner (Tr. 3505 ff), and the plaintiffs. Honest sidemen recognize this (Tr. 304 ff, 487 ff). Union witnesses admitted (Tr. 3666-67) that no more than 2% of the membership of Local 802 comprises orchestra leaders who never perform as sidemen. At other times Union witnesses testified that the number ranged between 87 and 125 out of 30,000 (Plaintiffs' Exhibit 58, Tr. 3667).

Defendants' Exhibit L, with respect to Local 802, shows that during nine months of the year 1960, 118 members (professional orchestra leaders) performed 15,051 "club date" engagements. These 118 leaders constituted four-tenths of one percent of Local 802's 30,000 members and 1.7% of the 6,000 members who, as "orchestra leaders", filed engagement contracts in 1960 (Plaintiffs' Exhibits K, L, M; Tr. 3505 ff, 1021 ff, 401 ff).

In a few areas in the United States, such as New York, Boston and Chicago, some orchestra-leader-employers use *subleaders* to conduct orchestras playing engagements on behalf of the orchestra-leader-employer. Outside these few areas, subleaders are unknown. Some purchasers of music object to subleaders, wanting only the leadership of the reputed leader. Others are satisfied with subleaders, trained by the leader, whose orchestra has something of the leader's style. When an orchestra leader employs a subleader, he multiplies work opportunities for such employee-musicians. If the leader performs an engagement (because the client insists on the leader's presence), the leader does not *displace*, as the court below held, a subleader. He merely *does not hire one*. In leading his

orchestra, the leader thus performs an often non-delegable task. He discharges duties and performs work characteristic of his peculiar type of employer-businessman status, just as the president of a business corporation performs executive tasks. The enterprise could not fare well without the orchestra leader's work.

The market for musical engagements is indicated by the AFM bylaws, its lists of Locals and of booking agents (Plaintiffs' Exhibit 100). Orchestra leaders with established businesses frequently travel across State lines (Tr. 1021-91; 401-459; 349-401; 3505-71; 800-29; 3641-42; 3685-86; 1425; 2227; 2231). Travel by orchestras in both single and steady engagement fields is contemplated by defendant Unions, and is regulated in the AFM bylaws (Plaintiffs' Exhibit 162, Articles 16, 17, 19).

7. *The "Form B" Contract.* For both steady and single engagements defendant Unions require under Union penalties that the orchestra leader and his client execute a "Form B contract" (Defs. Ex. CM, Article 13, § 33). This form falsely designates the purchaser of the music as the "employer" of both the leader and the sidemen (Defs. Exh. Z-1 and 2; Tr. 1040-48; 2482-86). Between 50-75% of all the musical engagements in the United States are contracted for by use of this Form B contract (Tr. 660-90; 41-48; 202-10; 1003).

Neither the orchestra leader nor the purchaser usually reads or knows the terms and conditions printed in fine print on the AFM Form B contracts (Tr. 42-43; 1043; 1412; 2486; 3000). The intention of the parties when they sign the Form B contract as well as their conduct under such contracts are at variance with the language thereof (Tr. 1040-48; 669-70; 682; 1104-05; 1111; 1184-90; 1735-48; 2482-86; 3000). In most cases, leaders using the Form B contract do not list on the reverse side the names, social security numbers and wages of their sidemen (Tr. 682, Plaintiffs' Exhibit 227). The price of the engagement,



which is entered on the face of the Form B contract, states the *total price* (paid by the purchaser) as defined in the Price List booklet (Tr. 46-7, 669-70; 203). Combination with non-labor groups, price fixing, suppression of competition and other monopolistic practices are all furthered by widespread and repeated use of the Form B contract, because it incorporates by reference all AFM and Local bylaws and regulations.

8. *Defendant Unions and Collective Bargaining.* In the single engagement field and in large areas of the steady engagement field, defendant Unions do not bargain collectively with orchestra-leader-employers (Tr. 26; 252-53; 3262). Less than 2,500 members of the AFM are engaged in the steady engagement field (Tr. 2984-95; 3183; 3366, Plaintiffs' Exhibits 96, 121, 229, 261).

The total number of employee-musicians covered by collective bargaining agreements was never disclosed by defendant Unions, which claim (Tr. 2984 ff) that they have collective agreements as set forth in the Trial Court's Finding No. 124 (App. 153-155). However, these labor contracts cover only a small number of Union members; and much of the collective bargaining which defendants assert in the steady engagement field (Tr. 2984-2995) is mere pretense or fiction; because the Form B contract and its variant forms are constantly used in connection with the alleged collective agreements, and these dub the purchaser of the music as the "employer"; and because they often result from Union imposition rather than collective bargaining.

The collective agreement between AFM and the recording companies (BS) is applicable to a small and occasional staff of employees of the recording companies. But it is applied, by means of the Form B contract, to orchestra-leader-employers who had no hand in its negotiation: Meyer Davis (Tr. 349 ff); Hank Thompson (Tr. 401 ff); Stan Kenton (Tr. 1021 ff); Herb Zane (Tr. 1159); Si Zent-



ner (Tr. 3505 ff). By its terms, the "Hotel Contract" covers only hotel, restaurant and nightclub employees. But it is enforced against all orchestra-leader-employers who perform in such places; and they are required to use the Form B contract. Moreover, none of the alleged collective bargaining agreements defines a *bargaining unit*. The contract between Local 802 and the Shubert Brothers (Ex. DJ) is on its face a contract between a labor union and a landlord who is manifestly *not* the "employer" of any musicians.

9. *Employer Status of Orchestra Leader*. There is no Record proof that *in fact* orchestra leaders or conductors are *employees* (as distinguished from *employers, independent contractors or supervisors*) in: radio and television, the making of musical transcriptions, the making of TV films, performances at hotels, nightclubs and restaurants, despite the Trial Court's Findings.

Payments into the Local 802 Steady Engagement Welfare Fund (Tr. 3777; 2226; 2378; 3152) are made by persons, firms or corporations who are not "employers" of the involved musicians (See Exhibits 333, 334, 335 and 336 and Defendants' Exhibit LL). Thus, such payments are violative of § 302 of the Taft-Hartley Act of 1947.

That professional orchestra leaders are businessmen and *employers in a non-labor group* is clear from the uncontradicted testimony of:

(1) Sidemen: (a) *Charles McCarthy* (Tr. 309-322; 328-331; 337-339; 345-346); (b) *Ted Diamond* (Tr. 492-496; 501-502; 504-505; 523-524); (c) *Julius Schwartz* (Tr. 561-564); (d) *Marty Melfi* (Tr. 3861-3866).

(2) Orchestra Leaders (the asterisk indicates witnesses engaged in both single and steady engagement fields): (a) *Meyer Davis\** (Tr. 352-355; 358-379; 383; 386a; 369-370; 392); (b) *Hank Thompson\** (Tr. 410-522; 430-432; 434-436; 452-458); (c) *Marty Levitt\** (Tr. 565-576; 623; 607-608; 612);

(d) *Jack Kahner*\* (Tr. 703-713; 829-830; 837a-845; 850-855; 858; 863-880); (e) *Emil Powell*\* (Tr. 734-740); (f) *Ruby Newman*\* (Tr. 811-817; 826-828); (g) *Marty Ames* (Tr. 933-943; 958-960; 965-966; 971-973); (h) *Matt Gillespie* (Tr. 979-983; 993); (i) *Stan Kenton*\* (Tr. 1026-1052; 1067-1070; 1079-1083; 1088-1089); (j) *Marty Beck* (Tr. 3161; 3166; 3168-3175; 3179-3180); (k) *Herb Zane*\* (Tr. 1163-1178; 1188-1189; 1198-1203); (l) *Charles Dickson*\* (Tr. 1213-1223; 1224-1228; 1229-1232; 1406; 1412); (m) *Herb Sherry* (Tr. 1295; 1300-1301; 1303-1305; 1307-1310; 1313; 1315-1318; 1322-1326; 1329-1332); (n) *Harry Lefcourt* (Tr. 1343; 1347-1350); (o) *Arthur Flatte* (& his brother) (Tr. 1359-1367; 1369; 1371-1373; 1383; 1388; 1392); (p) *Joseph B. Carroll* (Tr. 1444; 1934-1935; 1616; 1622; 1630; 1634-1641; 1836-1839; 1935); (q) *Burt Gross*\* (Tr. 1864-1869; 1873-1874; 1877-1888; 1891-1893; 1895-1897; 1899; 1902; 1905); (r) *George E. Seuffert* (Tr. 1911; 1913-1917; 1923); (s) *Ben Cutler*\* (Tr. 2229-2232; 2604-2609; 2616-2617; 2637; 2659; 2664; 2667; 2670); (t) *Charles Turecamo* (Tr. 2446); (u) *Marvin Kurz*\* (Tr. 1460-1463); (v) *Ray Cole*\* (Tr. 1572-1573); (w) *Karl Weiss* (Tr. 1605-1609); (x) *Charles Peterson*\* (Tr. 1737-1739; 1743-1748; 1950; 1963-1970; 1970-1973; 1986; 2063-2065); (y) *Eddie Wittstein* (Tr. 2483-2485; 2487-2488); (z) *Pat Dorn*\* (Tr. 2520-2521); (aa) *Roger Steele*\* (Tr. 2898; 2901-2910; 2913, 2915-2925); (bb) *Louis Kohuth*\* (Tr. 2963-2964; 2976-2981; 2974); (cc) *Tony Stevens*\* (Tr. 3047-3048; 3051; 3055; 3072-3074; 3079; 3086-3089; 3094-3097; 3099-3100; 3102); (dd) *Si Zentner*\* (Tr. 3514; 3519-3521; 3525-3533; 3536-3537; 3551-3553; 3561-3563); (ee) *Tony Cabot*\* (Tr. 3663-3665); (ff) *Ralph Martieri*\* (Tr. 1341-1342; (gg) *Lionel Hampton*\* (Tr. 1341-1342); (hh) *Art Farmer*\* (Tr. 2693-2695; 2702-2707).

(3) Booking Agents: (a) *Willard Alexander*\* (Tr. 531; 537; 541-542; 546-547; 552-553; 559-561); (b) *Joseph G. Glaser*\* (Tr. 1092-1097; 1114; 1116-1119; 1130-1133); (c) *Louis Riccardo* (Tr. 1002-1007); (d) *Howard Sinnot* (Tr. 2505-2507).

(4) Nightclub Operators (most of them using large numbers of orchestras annually): (a) *Oscar Goodstein*\* (Tr. 779-784; 787; 791-798); (b) *Joseph Termini*\* (Tr. 2222-2226; 2377); (c) *Plaintiffs' Exhibit 357*; *Cafe Metropole Contracts*\* (Tr. 3686-3690; 2226); (d) *Benjamin Maksik*\* (Tr. 3120-3121; 3128; 3139-3141; 3144-3151; 3155-3157); (e) *Michael Gaynor* (Tr. 635-636; 638; 643-644; 654-655; 1138; 1142); (f) *Ralph Watkins* (Tr. 2940-2943; 2951-2953).

(5) Defendant Union Officials: (a) *Herman Kenin* (Tr. 141-143); (b) *Stanley Ballard* (Tr. 3429-3430); (c) *Alfred Manuti* (Tr. 258-260).

(6) Fair, Steel Pier, Circus Operator: (a) *George Hamid* (Tr. 2713-2716; 2727).

(7) A & R men and other witnesses who testified respecting Recordings: (a) *Robert Morgan* (Tr. 2782-2787; 2769-2771; 2778); (b) *Louis Teicher* (Tr. 2293-2294; 2297-2300; 2308-2309; 2320; 2324-2325); (c) *Bert Fisher* (Tr. 3853-3857); (d) *Herman Diaz* (Tr. 1470-1486; 1490-1492; 1530-1540).

(8) Hotelmen: (a) *Clyde Harris* (Tr. 892-894; 902-907; 917-920; 927-928; 930-931); (b) *Ferrer Rama* (Tr. 481-484).

(9) Union attorney, Mr. Dannett (Tr. 254, 355, 386a).

#### 10. *Special aspects of the orchestra leader's status as employer.*

While the complaints in the instant cases, as well as plaintiffs' proof, covered both single and steady engagements, the Trial Court, for some inexplicable reason and without the slightest proof in the record, seemed to conclude that *in steady engagements*, the employer status of professional orchestra leaders was questionable and also that in some single engagements, such as recordings, they are "employees." Not only the proof in the record but common sense and the impartially dispensed information

contained in Mr. Simon's book, "*The Big Bands*", flatly contradicts these deviations from indisputable facts set forth in the Record.

After all, the only differentiation, self-servingly made by the defendant Unions, between single and steady engagements is *chronological*. Steady engagements last longer than single engagements. Why a professional orchestra leader, who is clearly an employer in a single engagement, should suddenly become an "employee" in the steady engagement is utterly inexplicable. Likewise, it would be difficult to assign a reason for saying that Guy Lombardo or Benny Goodman, who are unquestionably employers and professional orchestra leaders, should lose that status when one of the big recording companies asks them to make a record of the very same music played by them on single engagements. Shuttlecock shifting of the employer status of the same orchestra leader, simply because an engagement is five days rather than four days, simply does not make sense.

The treatment given to the "big bands" and their leaders, after whom the bands are named, by George T. Simon in his recent book "*The Big Bands*", quoted below, indicates that the 400 listed and described orchestra leaders are employer-businessmen, whether they play single engagements or steady engagements; and whether they make recordings, play on television or perform for radio. If it be objected that the plaintiffs, according to Judge Levett, are not "big bands" in the sense implied and defined by Mr. Simon, the latter himself furnished the answer by including plaintiff Ben Cutler in his 400, as well as the following plaintiffs' witnesses: Lionel Hampton, Si Zentner, Stan Kenton, Ruby Newman, Meyer Davis and Art Farmer. Moreover, many plaintiff witnesses described the performances of dozens of the famous orchestra leaders, given longer or shorter treatment in Simon's book. It is



significant that *defendant Unions at no time produced as a witness or described any orchestra leader in the class treated in "The Big Bands"*. At no time did any Union witness describe the operations of a band leader mentioned in Simon's book to show that band leader's lack of employer status in either single or steady engagements or on recordings or performances on radio and television. The only exception was Guy Lombardo, whom Mr. Arons, during the 1962 trial, attempted to convert into an "employee" of the Roosevelt Hotel, where he had been playing steady engagements. Plaintiffs immediately subpoenaed a witness from the Roosevelt Hotel. That witness testified that Guy Lombardo and his orchestra were not employees of the Hotel and were not on its payroll. The Hotel paid Lombardo \$6,000 per week, out of which he paid all his expenses, including the wages of his sidemen. The Hotel had nothing whatever to do with the sidemen and did not even know the wages paid by Lombardo to his sidemen. See Tr. 3429.

Plaintiffs' witnesses did testify that there was absolutely no difference in the role of an orchestra leader when he played a single engagement (which includes recordings, TV appearances and radio appearances) and steady engagements (Tr. 524-25, 1335-36, 3528, 3536).

"*The Big Bands*" has this to say about recordings in its chapter on that subject (*passim*, pp. 51-54):

"Records were important to the big bands—but not so greatly important as they are to today's musical groups, who without echo chambers and other electronic trappings would be completely uncommunicative. \* \* \*

"The musicians in the big bands differed from those of most of the popular recording groups of the sixties. They were not kids dependent primarily upon three chords and a smart engineer, but real musicians who



had spent years studying music and mastering their instruments. \* \* \*

"In addition, what went into a record came out exactly the same way, with no souped-up electronic gimmicks. \* \* \*

"A band's name power, as well as its interpretation of a song, helped create big hits. \* \* \*

"Most bands were impressed with the promotional value of recordings, but a couple of top leaders had little use for them. \* \* \*

"But the man who seemed to recognize even less the importance of recordings to the big bands was the most influential man on the entire big band scene, James Caesar Petrillo. Elected national president of the American Federation of Musicians in June, 1940, and perturbed by the possible adverse effects of recording on his membership, he hired Ben Selvin, a highly respected recording executive and orchestra leader, to conduct a thorough study of the entire recording field as it affected musicians.

"Selvin's report was exhaustive. Presented at the annual convention of the musicians' union, it received a standing ovation from the delegates. Estimating that by the end of 1941 the recording industry would have paid out more than three million dollars to working musicians, Selvin recommended that 'it would be unwise, if at all possible, to curtail industries where such large amounts are spent for musicians. There are remedies for the unemployment caused by this mechanization of music, but a knockout blow, which could not be delivered, is not the answer.'

"So what did Petrillo do? On August 1, 1942, he tried for a knockout—he ordered his musicians to stop all recording. His argument was simple but specious. If the record companies couldn't devise some system

whereby musicians were paid for the use of their recordings on radio programs and in juke-boxes, then he wouldn't let them record at all. The big band leaders almost to a man disagreed violently with Petrillo's actions. They recognized far better than he the importance of records to their future. But James Caesar stuck dictatorially to his battle plan.

"For more than a year no major company made any records with instrumentalists. They did record singers, however, usually with choral backgrounds. Finally in September, 1943, Decca signed a new contract with the union. A month later, Capitol followed suit. But the companies with most of the big name bands, Columbia and Victor, fought for more than a year longer.

"It was a mess. Late in 1943 the War Labor Board (WLB) was asked to help. Four months later, finding in favor of the recording companies, it recommended that the strike be ended and 'conditions prevailing on July 31, 1942, be restored'. But Petrillo refused to accept the recommendation. Even President Roosevelt got into the act, requesting an end to the strike. Again Petrillo said no. Finally in November, 1944, Columbia and Victor capitulated and agreed to pay the union a royalty for all records released.

"Petrillo was jubilant. He claimed 'the greatest victory for labor . . . in the history of the labor movement' In a way he may have been right. The rank-and-file membership, two-thirds of whom, according to the WLB report, did not depend upon music for a livelihood, had won a victory. As for the knockout blow that the Selvin report had predicted couldn't be delivered—well, it may not have been a knockout, but it certainly was a knockdown. Unfortunately, it didn't hit the recording companies nearly as hard as it hit the big bands. And then, when the bands finally did get up from the floor, after a long count of two years

and two months, they found that they were no longer champions of the recording field. While they had been down, the singers had taken over, and the recording field would never again be the same for the big bands."

The foregoing quotation, though lengthy, is important. It shows not only that Union interference seriously hurt the bands of professional orchestra leaders but that there never was any change in the *employer status* of professional orchestra leaders, when they took their bands to recording studios to make records. The identity of the big band was not lost or altered because, as defendant Unions erroneously aver, the big band was subjected to the domination and control of an A & R man [*infra*]. It was the band's name and its interpretation, for which the leader alone was responsible, which created record hits. Where the latter included new interpretations of old, standard songs, "usually the band leaders [said Simon] came up with the idea of resurrecting such old standards. Sometimes they met with strenuous objections from the record company artists and repertoire (A & R) men who were under constant pressures from their sponsors to record 'sure hits', and from music publishers who constantly kept assuring them that their particular tunes were those 'sure hits'. It's gratifying to those of us who were constantly fighting for higher musical standards that the big band record hits that have survived have almost always been those which the bands, not businessmen, dug up and fought to get on wax \* \* \*" (p. 52).

For obvious reasons, recording companies were not interested in recordings from untrained, improvised bands, gotten together *ad hoc* by sidemen-turned-orchestra-leaders. Indeed, the record is so conclusive on this subject, that one is left wondering how the Trial Court could, upon the basis of record evidence, have concluded that orchestra leaders and their sidemen, when making recordings, are the "employees" of the recording company. For example,

Fisher, a former employee of Local 802, testified that he was in its recording department for three or four years (Tr. 3846); and that he was present at thousands of recording sessions (Tr. 3853). From the vantage point of that experience, he said that the orchestra leader was always in control of the orchestra, and not the A & R man, during the recording sessions (Tr. 3857). AFM President Kenin testified that the recording company is the purchaser of the music (Tr. 63-64) and that all recording companies are treated the same (Tr. 135). Sideman McCarty testified that he was an employee of orchestra leader Ben Ludlow when the latter made recordings (Tr. 339). Meyer Davis testified, as a professional orchestra leader, that when he made recordings or appeared on TV and radio he was the employer of his sidemen (Tr. 375-77, 392). Orchestra leader Herb Zane's recording procedure reveals that he too was the employer during recordings (Tr. 1198-1203). Orchestra leader Stan Kenton testified that his recording contract did not give the recording company the final say (Tr. 1080); and that no A & R man ever rejected or controlled his recording (Tr. 1079). His recording procedure shows that he was the employer at all times (Tr. 1059-65). Without telling him why, Capitol abandoned the lump-sum agreement (Tr. 1089), obviously at the instance of AFM. In any event, Capitol, in paying employer deductions at the bidding of the Union, never failed to subtract these deductions from Kenton's royalties (Tr. 1067). Hank Thompson's recording experience was exactly the same (Tr. 415-16, 420-22, 430-32). Orchestra leader Si Zentner also was employer during recordings (Tr. 3512, 3526, 3551, 3563-64). So was orchestra leader Art Farmer (Tr. 2699-2700). Union official Arons described how the recording companies obeyed Union dictation in these matters (Tr. 3596-97), even though those recording companies were obviously not employers of the orchestra leader and his sidemen. A & R man Diaz (Tr. 1465) is not even able to read music (Tr. 1479). He testi-



fied how large companies capitulate to the Union, obligingly paying the wages of sidemen to the Union itself (Tr. 1533, 1491-92, 1527). He admitted that the instrumentation of an orchestra is matter of agreement between the orchestra leader and the recording company (Tr. 1518-19). He also admitted that the amounts of wages of sidemen paid to the Union are deducted from the royalties paid by the recording companies to the orchestra leader (Tr. 1536-42). There is a difference between a dance band led by an orchestra leader, and an orchestra actually *in the employ of some famous vocalist* (Tr. 1533-34). No plaintiff and no orchestra leader in the class of the plaintiffs is an employee of any vocalist. A & R man Morgan (Tr. 2752), called by defendants, admitted that he does not have sole control (Tr. 2769-71). Some 80-85% of the recordings are by vocalists and their own orchestras, 10% are transcriptions, made by either vocalists or professional orchestra leaders and 3-5% are big name bands, led by professional orchestra leaders (Tr. 2778-79, 2787). Recording company official Tiecher testified that no staff musicians are today employed in the phonograph industry by the recording companies themselves (Tr. 2308).

(11) *Leaders and their Bands as appraised by Simon.* Within the last month the Macmillan Company, New York, and Collier-Macmillan Limited, London, published "*The Big Bands*", by George T. Simon, Editor of *Metronome*, the country's oldest and most respected music magazine. There he describes some 400 big bands, many of which were nationally and internationally known. He devotes a chapter to "The Leaders" (pp. 8-10) of whom he says:

"Some were completely devoted to music, others entirely to the money it could bring.

"Some possessed great musical talent; others possessed none.

"Some really loved people; others merely use them.



"Some were extremely daring; others were stogily conservative.

"Some were motivated more by their emotions, others by a carefully calculated course of action.

"At the other end of the bandleading scale were those not nearly wise or calculating enough to realize that they never should have become bandleaders in the first place. Among these were some of the most talented and colorful musicians on the scene, to whom the music business meant all music and no business. Their lives were undisciplined and so were their bands. They swung just for the present, for a present filled with loads of laughs and little acceptance of their responsibilities as leaders. Unfortunately, almost all of this last group wound up as bandleading failures. For no matter what they would have liked to believe, leading a band was definitely a business, a very competitive, complex business consisting of almost continuous contracts—and often difficult and crucial compromises—with a wide variety of people on whom not merely the success but the very life of a dance band depended.

"The leaders were called on to deal daily and directly—and not only on a musical but also on a personal basis—with their musicians, their vocalists and their arrangers, directing and supervising and bearing the responsibilities of each of these groups. But that wasn't all. For their survival also depended a great deal on how well they dealt with all kinds of people outside their bands—with personal managers, with booking agents, with ballroom, nightclub and hotel-room operators, with headwaiters and waiters and bus-boys, with bus drivers, with band boys, with the press, with publicity men, with music publishers, with all the various people from the radio stations and from the record companies and, of course, at all times and in all

places—and no matter how tired or in what mood a leader might be—with the ever-present, ever-pressuring public.”

Beginning at page 5 of “*The Big Bands*”, Simon wrote:

“Why were some [orchestras] so much more successful than others? Discounting the obvious commercial considerations, such as financial support, personal managers, booking offices, recordings, radio exposure and press agents, four other factors were of paramount importance.

“There was, of course, the band’s musical style. This varied radically from band to band. \* \* \* Each band depended upon its own particular style, its own identifiable sound, for general, partial or just meager acceptance. In many ways, the whole business was like a style show—if the public latched on to what you were displaying, you had a good chance of success. \* \* \*

“Generally it was the band’s musical director, either its arranger or its leader or perhaps both who established a style. \* \* \*

“Secondly, the musicians within a band, its sidemen, played important roles. Their ability to play the arrangements was, naturally, vitally important. \* \* \*

“But the musicians were important in other ways too. Their attitude and cooperation could make or break a band. If they liked or respected a leader, they would work hard to help him achieve his goals. \* \* \* The more musical the band and the style, the greater, generally speaking, the cooperation of the musicians in all matters—personal as well as musical

“Thirdly, the singers—or the band vocalists, as they were generally called \* \* \*. A good deal depended upon how much a leader needed to or was willing to feature a vocalist. \* \* \*

"But of all of the factors involved in the success of a dance band—the business affairs, the musical style, the arrangers, the sidemen and the vocalists—nothing equaled in importance the part played by the leaders themselves. For in each band it was the leader who assumed the most vital and most responsible role. Around him revolved the music, the musicians, the vocalists, the arrangers and all the commercial factors involved in running a band, and it was up to him to take these component parts and with them achieve success, mediocrity or failure."

The unbiased appraisal of an impartial expert thus certifies, based on long experience, the role and function of the successful professional orchestra leader.

12. *The leader's modes of leading.* The manner in which the personality of the leader, and the training he gives to his sidemen, are impressed upon an orchestra appears from the following interesting episode from the life of orchestra leader Count Basie, as told by George T. Simon (*"The Big Bands,"* p. 85):

"The importance of the drummer has been stressed by Basie. 'You may think you're the boss,' he once said, 'but that drummer is *really* the head man. When he's not feeling right, nothing is going to sound good.'

"Drummers certainly can inspire bands to do things they never did before. This actually happened with the Basie band one time when it was playing at the Palladium in Hollywood. Jones had been taken ill, so Basie asked Buddy Rich to fill in for the evening. Buddy, when he feels like playing, is undoubtedly the most inspiring drummer in the world, and as any musician would, he was thrilled at the opportunity of working with the Basie band. According to those who were there that night, the men performed brilliantly. As the Count reported some time later, 'We asked

Buddy to play again the next night. And you know what happened? The entire band showed up *early* for work. Now, you know that was just about unheard of in that band.'

"Even though Basie credits the drummer with being 'head man', don't let him fool you. Basie is strictly in charge at all times. This may not be obvious to those on the outside, though if they watch the band long enough, they'll realize that all the directions come from little, subtle motions from the Count at the piano. He may shrug his shoulders in a certain way to give a specific warning to the drummer. He may cock his head at a special angle to tell the entire band to come way down in volume. Or he may hit just one key to cue the ensemble into a rousing, roaring finale." (*ibid.*, 85-7)

13. *The leader in relation to his sidemen.* Frank Sinatra wrote the foreword to "*The Big Bands*". In it he stated:

"Whether you were an instrumentalist or a vocalist, working in a band was an important part of growing up, musically and as a human being. It was a career builder, a seat of learning, a sort of cross-country college that taught you about collaboration, brotherhood and sharing rough times. \* \* \*

"I've said this many times, but it can never be said too often: a singer can learn, should learn, by listening to musicians. My greatest teacher was not a vocal coach, not the work of other singers, but the way Tommy Dorsey breathed and phrased on the trombone." (p. ix)

There is a typical or representative manner in which every employer-businessman operates. That mode will of course be different from industry to industry. But on that mode depends the employer's ability to prosper his business. For an orchestra leader to obtain engagements from



the public, and thus to provide jobs for his sidemen and subleaders (in the few areas where subleaders are known), the leader *must* perform and *must be able* to perform in the mode peculiar to orchestra-leader-entrepreneurs. To prevent him from doing this is not only to rob him of his career but to deprive employee-musicians of their work. As Mr. Simon put it in "*The Big Bands*" (p. 8), for some orchestra leaders, "leading a band was primarily an art; for others, it was basically a science." To interfere with that art by labor union or any other intrusion, to limit the growth of that science by meddlesome regulations, to cramp the artistic style of the leader, whether he plays an instrument or not, must in the long run spell catastrophe not only for the leader and his popularity but also for his employee-musicians. The latter, on loss of popularity gained by the leader acting in the manner characteristic of orchestra leaders, would lose their jobs. Just as the ordinary businessman or executive in each industry has an approach of his own, usually tested by time and experience, so too do orchestra-leader-entrepreneurs. "Their approaches varied with their personalities and their talents" wrote Mr. Simon (*ibid.*, p. 8), who continues: "Highly dedicated and equally ambitious musicians like Glen Miller, Benny Goodman, Artie Shaw and Tommy Dorsey approached their jobs with a rare combination of idealism and realism. Well trained and well disciplined, they knew what they wanted, and they knew how to get it. Keenly aware of the commercial competition, they drove themselves and their men relentlessly, for only through achieving perfection, or the closest possible state to it, could they see themselves realizing their musical and commercial goals.

"Others, equally dedicated to high musical standards but less blatantly devoted to ruling the roost, worked in a more relaxed manner. Leaders like Woody Herman, Les Brown, Duke Ellington, Gene Krupa, Count Basie, Harry James, Claude Thornhill and Jimmy Dorsey pressured their men less. 'You guys are pros,' was their attitude,



'so as long as you produce, you've got nothing to worry about.' Their bands may have had a little less machine-like proficiency, but they swung easily and created good musical and commercial sounds.

"Other leaders, often less musically endowed and less idealistically inclined, approached their jobs more from a businessman's point of view. For them music seemed to be less an art and more a product to be colorfully packaged and cleverly promoted. The most successful of such leaders, bright men like Guy Lombardo, Kay Kyser, Sammy Kaye, Horace Heidt, Shep Fields, Wayne King and Lawrence Welk, were masters at creating distinctive though hardly distinguished musical styles; men respected more for commercial cunning than for artistic creativity. They might have been faulted by *Metronome* and *Down Beat* but never by *The Wall Street Journal*."

14. *Booking Agents and Leader-Employers.* The Union booking agent system is established by Article 25, AFM Bylaws (Plaintiffs' Ex. 162). That Article is enforced as written (Tr. 25-6, 3400). All active leaders use the services of booking agents at least from time to time (Tr. 130, 419-21). Orchestra leaders are required by AFM to use only those booking agents who are licensed by AFM (Tr. 131-32, 2503, 3374). Local 802 sends its official journal, "*Allegro*", to all booking agents to keep them informed about Union standards (Tr. 1238). Article 25 permits AFM to withdraw the license for any reason or no reason at all and without notice. That, of course, would ruin the booker's business, which is considerable (Tr. 527-29, 556, 1097-98).

Moreover, booking agents are required by Article 25 AFM-licensed and their own licenses to adhere to union prices, wages and minimums in booking engagements. As a result, they always comply with AFM rules, thus combining with defendant Unions (Tr. 998; 532-33, 1102, 1133). Booking agent Sinnott refused to book Peterson after he was expelled (Tr. 2007). AFM fixes the maximum com-

pensation for booking agents (Tr. 546-47). Orchestras constitute a large part of the business of booking agents. For example, Willard Alexander, one of the largest booking agents in the country, testified that 90% of his attractions are orchestras. The Secretary of AFM, Stanley Vallard, testified: "The booking agent must, when he books an orchestra, book them at no less than Union scale \* \* \*" (Tr. 3432). In the Union jargon, "Union scale" includes Union minimum prices.

15. *The Big Bands yesterday and today.* Professional orchestra leaders must, of course, have some following in order to live by their professions. As of any given moment, they can be internationally known, nationally known, regionally known, locally known and relatively unknown (Tr. 3540-44, 3566-67, 552-53, 794-96, 1093-96, 1118-1269). George Simon's "The Big Bands" purports to be a "report of the big bands during their greatest years—from 1935-1946" (Preface, p. xii). In those days, "big bands" meant orchestras of ten men or more, according to Sinatra's Foreward to this book (p. viii). Though the number of big bands in that sense has decreased considerably since 1946 (Tr. 1086), success as an orchestra leader or as an orchestra depends on operations like those of the big bands which performed between 1935-46 (Tr. 1055-1056). Professional leaders like plaintiffs today function exactly as did the leaders of the big bands; except that the number in the orchestra has been reduced, and perhaps some of the glamour has tarnished. Indeed, many of the 72 big bands whose leaders are described in detail by Simon (pp. 75-452) still carry on; such as Count Basie, Les Brown, Bob Crosby, Xavier Cugat, Dizzy Gillespie, Benny Goodman, Lionel Hampton, Woody Herman, Sammy Kaye, Stan Kenton, Wayne King, Gene Krupa, Guy Lombardo, Ben Cutler and many others.

No matter how great the reputation of an orchestra leader, it had to be elaborated by hard work over a period

of time. It was not an inheritance or a gift. It was not born in full panoply. Most of the leaders started as sidemen. The method of operation which brought them to eminence in their field, they continued after they obtained that eminence. They were never mistaken for sidemen; and no sideman was ever mistaken for an established leader. Most of the leaders played an instrument. Indeed, that was often the key to their success. Simon in Part III of "The Big Bands" lists more than 300 leaders, dividing them into classes such as the following: the arranging leaders (p. 459 ff), the horn-playing leaders (p. 465 ff), the reed-playing leaders (p. 475 ff), the piano-playing leaders (p. 480 ff), the violin-playing leaders (p. 485 ff), the singing-leaders (p. 487 ff).

16. *The different interests of leaders and sidemen; their "competition"*. Ted Diamond, a professional sideman, testified that leaders have a different outlook from sideman (Tr. 508). The man who is now President of Local 802 testified (Tr. 3657-59) that the interest of leaders is not compatible with the interest of sidemen. Sidemen always want more wages (Tr. 3660). If sidemen are dissatisfied with the wages being paid in the 400 to 500 "Class C" establishments in the New York City area, Local 802 sends down a business agent to raise the wage scale (Tr. 3498). The IBM cards maintained by Local 802 distinguish between leaders and sidemen (Tr. 3823) but not between professional leaders and the vast majority of those who file contracts as orchestra leaders on a few, random occasions per year. However, Mr. Arons though stating that there were 30,000 potential leaders in his Union (Tr. 212) admitted that leaders like plaintiff Cutler were only about 2% of the membership (Tr. 3666-67). He added that this 2% "competes" with the remaining 98% of the members. He meant that they competed for jobs *as leaders*. In other words, 98% of the 30,000 members of Local 802, according to Arons' hyperbole, are all looking for jobs *as orchestra*

*leaders*. Even if this were literally true, that would only mean that they as "*leaders*" are "competing" with the professional orchestra leaders.

Orchestra leaders, too, feel that there is diversity of interests between leaders and sidemen, because the leaders are minorities in their Locals (Tr. 2497) and because sidemen therefore get what they want at Union Price List meetings (Tr. 2498). With obvious exaggeration, Arons testified that the "overwhelming majority who do club dates as leaders" have an interest in raising the wages of sidemen: " \* \* \* Their interest would be to pay more money because they also act as sidemen" (Tr. 3659-60)! That statement may or may not be true of *ad hoc* "orchestra leaders", who occasionally improvise orchestras. It is certainly not true of *professional* orchestra-leader-employers. On its face it is incredible as to them. Arons had earlier testified that he was an "orchestra leader" *whenever he got a job or engagement to perform as such* (Tr. 224). That, obviously, did not make him a *professional* orchestra leader with an established clientele. Nor did it put him in the class of those who could effectively or meaningfully compete with plaintiffs as established professional orchestra leaders. The "competition" in such case would have to be between an established leader and a would-be leader. Arons incredibly testified that Max Sontag competed with Ben Cutler (Tr. 3667), something which Cutler himself denied (Tr. 2567-68). Arons figured out that there were about 120 musicians, out of the 6,000 who had filed contracts as leaders who were in the class of Cutler (Tr. 3667). The 120, being in the class of Cutler, never perform as sidemen. A typical example of a professional sideman (Tr. 331-39) who occasionally acts as a leader (Tr. 324) or as a subleader (Tr. 327) is Charles McCarty (Tr. 304 ff). Clearly, when McCarty turns from his profession as sideman in an endeavor to obtain and file a contract as a leader, he is "competing" with professional orchestra leaders not as a sideman but *as a leader*. This might cause a problem for professional



orchestra leaders (Tr. 1950-51). It should be no concern of a union. See Supplement.

17. *Decrease in musicians' jobs.* Precisely because the Unions made many entrepreneurial interests their own concern, the Union membership has remained stagnant and without any increase from 1953-1963 (Tr. 3270). Staff men employed on radio and television decreased ever since 1954 (Tr. 2300-02). Although there are some 4,000 radio stations and about 1,000 TV stations there is practically no live music on radio today (Tr. 3579, 3581, 3583-86). AFM has lost men in the radio and television field (Tr. 181-82).

18. *No competition between leaders below Union standards.* The Union price-fixing lists and booklets are so well enforced that no competition exists at prices below Union minimum prices (Tr. 2567-2568, 3653-55). The Union minimums are expressly designed to prevent competition (Tr. 3240). There is competition among orchestra leaders as such (Tr. 89-90) but not at prices below the Union's minimum prices (Tr. 389, 3652). Some leaders, in combination with the Unions, want to see the engagement prices raised, "because it helps them to negotiate. The higher the scale fixed by the Union the more the leader gets. That's the gist of it". So testified the Local 802 Treasurer, Hy Jaffe (Tr. 1253-54). The Union undertakes to supervise competition (Tr. 3725) between leaders. It even tried to regulate competition between the Americana Hotel and the Waldorf Astoria Hotel (Tr. 3244-45). Its supervision results in prevention of competition (Tr. 3727-28).

In addition to regulating and supervising price competition, the Unions engage in the regulation of competition in order to keep Local engagements for leaders and jobs for sidemen (Tr. 281). Another method of interfering with and restraining competition is embodied in the Union rule that a member on a steady engagement may not in some cases during that engagement, play a single engagement



(Tr. 3318-20). There is a bylaw which forbids traveling orchestras from competing with local orchestras when they come into New York City (Tr. 146). The Unions regulate competition between orchestra-leader-entrepreneurs by making certain prices mandatory upon a leader-employer who belongs to one Union and different, lower prices become optional when the leader-employer belongs to two or more Unions (Tr. 748 ff, 2472-75; App. 93 ff).

19. *Leader bidding against sidemen.* Peterson testified that he never bid for an engagement against a sideman or subleader (Tr. 1976). Actually, he could not possibly do so; because sidemen and subleaders *as such* never bid for engagement contracts. They are never permitted by Union rules to file an engagement contract for Union approval *as a sideman or a subleader*. They can file contracts only as leaders. Peterson knew of no bids against him by *any sideman* (Tr. 2154), by which he must have meant any sideman-turned-leader for the occasion. See Supplement at end of this brief, *passim*.

Orchestra leader Dorn never bid for a job against a sideman either (Tr. 2510-11). Plaintiff Carroll never bid against any except reputed professional leaders (Tr. 1801 ff). Plaintiff Cutler never bid against Max Sontag who is regularly a sideman, but only against professional orchestra leaders (Tr. 2567-68). Steele (called by defendants), who is sometimes a sideman and sometimes a leader, mistakenly testified that he bid against Cutler (Tr. 2894). Cutler denied this. In any event, Steele could only bid against Cutler *qua* leader and not *qua* sideman or subleader. Likewise, Cutler denied that he ever bid against Tony Stevens (called by defendants), who is sometimes a leader and sometimes a sideman (Tr. 3871-72). While Cutler does not know who bids against him when he seeks engagement contracts, he is convinced that from time to time he has lost jobs to sidemen, i.e., sidemen-turned-leaders (because it is impossible, even under Union rules, for a leader to lose an engagement contract to a

sideman or to a subleader) (Tr. 2553). He corrected his testimony by saying that he doesn't know if he ever bid against any sideman (turned-leader) (Tr. 2566-67); and he doubted that he ever lost a bid to a sideman (Tr. 2570-71). His doubt is based upon the fact that his standing in his profession, as an established professional orchestra leader (included in the 400 "Big Bands", written by George T. Simon), would suggest that nobody looking to Cutler for an orchestra engagement would entrust a sideman with such an assignment.

### Questions Presented

1. Whether defendant-Unions violated Federal antitrust laws by combining with non-labor groups (many classes of employers and businessmen, *e.g.*, orchestra-leader-employers who comply with defendants' bylaws, many hotels, nightclubs, restaurants, caterers, booking agents, theatre owners, dance-hall operators, recording companies, radio stations, TV stations and others) for the *purpose* or with the *effect* of (i) fixing prices, (ii) eliminating or suppressing competition and restraining trade, (iii) imposing unreasonable restraints on interstate commerce, and (iv) engaging in numerous monopolistic practices in the field of musical entertainment in the United States?<sup>1</sup>

2. Whether certain Union practices, enforced or maintained by defendant-unions in combination with non-labor groups (namely, such Union practices as unilateral establishment and imposition of wage scales, closed shops, minimum employment quotas, etc.) constitute antitrust law violations, even though, without combination with non-

<sup>1</sup> This is the first question presented by cross-petitioners' Brief in Opposition to Petition for Certiorari, page 2. The question as stated above includes, pursuant to this Court's Rule 40(1)(d)(1), a number of "subsidiary" questions fairly comprised therein. These subsidiary questions are spelled out in the cross-petition (p. 2, ff) by a number of questions there presented, namely, those numbered 2, 3, 4, 5, 6 and 20.

labor groups, they might also be unfair labor practices under the NLRA?<sup>2</sup>

3. Since application of the Sherman Act "involved the balancing of conflicting Congressional policies", as the Court below said, can the Norris-LaGuardia Act be said to take *all* "labor disputes" outside the reach of the Sherman Act, thus indiscriminately providing unions with a blanket exception, or only *some* disputes, *i.e.*, those where the union (unlike the Unions here involved) does not *combine with non-labor groups* to fix prices, suppress competition, and to impose other commercial restraints?

4. Whether defendant-petitioners' bylaw and practice, requiring all leader-employers to use the "Form B" contract, which was unilaterally prepared by AFM and was and is enforced in combination with non-labor groups, violates the antitrust laws not only because said contract is a tool for price-fixing but also because it is itself an important means for effectuating defendant-unions' other monopolistic practices in combination with non-labor groups?

5. Whether defendant-petitioners' unilateral establishment, by bylaws obligating leader-employers, of numerous travel restrictions and their enforcement in combination with non-labor groups, cumulatively constitute unreasonable burdens on interstate commerce?

6. Whether the bald, unsupported statement by defendant-unions and by the Trial Court that plaintiffs engage in "job competition" with Union employee-musicians justifies

---

<sup>2</sup> This question was question numbered 7 in the cross-petition (p. 3) and it includes the following subsidiary questions printed in the cross-petition (pp. 3-5): questions numbered 8, 9, 10, 11, 12 and 19.

<sup>3</sup> This question was numbered 15 in the cross-petition (p. 5) and it includes a number of subsidiary questions: namely, questions 13, 14, 16, 17, 18 and 26 presented in the cross-petition (pp. 4-7).

the statement of the Court below that employers like plaintiffs are "proper subjects for union membership"?"

7. Is there a class of *professional orchestra-leader-employers* within the meaning of Rule 23 FRCP, despite the fact that some leader-employers prefer and are benefited by the Union's price-fixing and other monopolistic practices in combination with non-labor groups; and should any court take cognizance of such a preference for law-breaking?

### Statutes Involved

(1) *Sherman Antitrust Act*. Act of July 2, 1890, c. 647, 26 Stat. 209; 15 U.S.C.A. §§ 1-7, as amended.

"Sec 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal \* \* \*."

(2) *Clayton Act*. Act of October 15, 1914, c. 323, 38 Stat. 730, as amended.

"Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

---

\* This question was question numbered 23 in the cross-petition (p. 7) and it includes the following subsidiary questions numbered 24 and 25 of the cross-petition (p. 7).



## Summary of Argument

1. Defendant Unions violated the antitrust laws *by combining with non-labor groups for the purpose or with the effect of*: fixing prices, eliminating or suppressing competition, imposing unreasonable restraints on interstate commerce and engaging in many other practices which constitute unlawful monopolistic practices. These latter include, among many others, the unilateral imposition of minimum-employment-quotas, a multitude of unreasonable interferences with the businesses of orchestra-leader-employers, bylaws which suppress competition and restrain trade, universal imposition of the "Form B" contract and its substitutes, use of a system of licensing booking agents, and a spurious "arbitration" procedure under Article 9, AFM Bylaws.

AFM and Local contract provisions and their bylaws constitute two most important forms of union *combination* with non-labor groups. Other combinations are by tacit arrangement as, for example, in the catering industry. Professional leader-employers, booking agents, hotels, nightclubs, restaurants are all employer-entrepreneurs. As such, they may not properly be placed in any *labor group*. The fact that many Union members occasionally call themselves "orchestra leaders" and improvise as such on an *ad hoc* basis, does not derogate from the status and rights of the relatively small group or class of active, professional orchestra leaders represented by plaintiffs. Such leader-employers are businessmen who derive their livelihoods from their professions as orchestra leaders and who never or very rarely perform as sidemen (and then only to accommodate a fellow leader). They do not compete with sidemen for the latter's jobs. Sidemen do not compete, significantly or meaningfully, with them for engagements; and if they did, such competition is not something to be regulated by unions in combination with leader-employers.



2. The fact that certain of the Union activities challenged by plaintiffs are or might be NLRA *unfair labor practices* does not detract from the further fact that, *when they are performed in combination with non-labor groups*, they are, because by their very natures they exhibit exercise of monopoly power, also violations of the Sherman Act; especially when they are considered with accompanying union activities which are purely antitrust law violations.

By this contention, cross-petitioners seek to establish that said Union conduct must be regarded as antitrust law violations without preliminary NLRB decision as to possibly involved unfair labor practices, which (as such) have nothing to do with the involved combination with non-labor groups. Union violations of the national labor policy constitute a series of predatory practices under the anti-trust laws. Nor is it relevant, as the Court below thought, "that a music purchaser \* \* \* cannot refuse to bargain on a union's demand that only musician-employees who belong to the Local union be employed"; since *admittedly* there is not and never has been bargaining with purchasers of music. Likewise, it is irrelevant that travel restrictions and employment quotas are *usually* (i.e., in *other* unions) mandatory subjects of bargaining; because it is *undisputed* that defendant Unions systematically refuse to bargain or deal with leader-employers. Even if it be true that the national labor policy "demands that the parties be permitted freely to reach agreement on terms and conditions directly affecting the working man" (as the Court below stated), that somewhat unqualified statement does not help the petitioning Unions to an exemption from antitrust law obligation, because said Unions systematically refuse to bargain with orchestra-leader-employers. The Court below erred in holding that "exertion of pressure on orchestra leaders to join the union reflects a legitimate concern for the closed shop"; since the closed shop is banned by Federal statute. It was error for the

Court below to regard the petitioning Unions establishment of minimum employment quotas as merely a "term or condition of employment". Those employment quotas are different from employment quotas encountered in other cases involving other unions; because the Unions reckon the leader-employer as *one of the quota*; whereas in other contexts the *employer is never part of the quota*. This necessarily means that the minimum employment quotas of the defendant Unions result in price-fixing. The orchestra-leader-employer may not waive this Union decreed minimum profit for leaders (Plaintiffs' Exhibit 241).

3. The Norris-LaGuardia Act does not take *all* "labor disputes" outside the reach of the Sherman Act because application of the Sherman Act involves a balancing of conflicting Congressional policies as set forth in the Sherman Act, the Norris-LaGuardia Act, the NLRA, the Taft-Hartley Act and the Landrum-Griffin Act. To grant unions indiscriminately a blanket exemption with respect to *all* "labor disputes" would premise no balancing of conflicting policies but rather elevation of the Norris-LaGuardia Act's policy to paramount status. *Hunt v. Crumbock*, 325 U. S. 21 (1944) is not today an unclouded precedent. It antedated the Taft-Hartley Act (1947) and the Landrum-Griffin Act (1959). In any event, the Unions in those cases *did bargain collectively*; whereas the Unions here never did. For this reason, the petitioning Unions' travel restrictions and their peculiar minimum employment quotas, for example, are not immune from attack because of the Norris-LaGuardia Act. Nor is it true that under that Act, or under the Sherman Act as construed in the Allen-Bradley doctrine, the *purpose* of the combination between unions and non-labor groups must be "to create a local business monopoly". It is sufficient that the *effect* of the combination is to create a business monopoly. The cases do not require that there must be a conscious *conspiracy* between the collaborators. A *combination* be-

tween the petitioning unions and non-labor groups to fix prices, to suppress competition and to impose other commercial restraints, is sufficient to cause the instant cases "to fall outside the protection of the definition of labor dispute in §.13 of the Norris-LaGuardia Act."

4. Enforcement of petitioning Unions' bylaws and practices impose an extensive series of unreasonable burdens on interstate commerce.

5. There is absolutely no competition for *sidemen's jobs* between professional orchestra-leaders on the one hand and their employee-musicians on the other. The record is altogether devoid of evidence of any credible *specific* instance of such competition. The record merely contains general assertions of "competition" by Union officials where competition simply means that an established professional leader sometimes (very rarely) finds that he has lost an engagement to a sideman-turned-leader. Such "competition" *between leaders* is not lawfully subject to regulation by unions combined with non-labor groups. No professional leader admitted such competition to any significant extent. Leader-employers are not proper subjects for Union membership, any more than grease peddlers were in *Los Angeles Meat Drivers case* (371 U. S. 94). Price-fixing and other monopolistic practices of the petitioning Unions in combination with non-labor groups may not lawfully be excused upon the vague, unsupported ground that there is "job or wage competition or any other economic interrelationship" between leader-employers and their employees. The right of an orchestra leader to perform usual functions as such (*e.g.*, the playing of a musical instrument while leading) without interference by Unions is as sacred as the right of the employee to engage in concerted activity or to perform his job in order to earn his livelihood.

6. There is a busy class of leader-employers, who are *full-time, professional* orchestra leaders deriving their liveli-

hood or most of their livelihood from their profession. It is relatively extremely small (less than 2%) by comparison with the total number of AFM members who, from time to time, function *ad hoc* as "orchestra leaders" and who in desultory fashion improvise orchestras for such sporadic occasions. The Court below seemed to think that the existence of a class was destroyed by the admitted fact that many leader-businessmen in the class presented by the plaintiffs are in favor of Union price-fixing and the Unions' other commercial restraints. Such an interest in unlawful practices is not properly cognizable at law. No leader-employer should be heard to say that he is in favor of price-fixing by the petitioning Unions in combination with himself and other orchestra-leader-employers of like mind.

## ARGUMENT

### POINT I

(Addressed to Questions 1, 3, 4 and 5)

The Union price-fixing (and other antitrust law violations) in these cases is largely effectuated by Union bylaws obligating all members, including orchestra-leader-employers. The latter are entrepreneurs, who as union members previously participated in formulation of Union prices (and other commercial restraints) at Union Price List Meetings. Those bylaws are enforced in combination with many types of businessmen (including such orchestra-leader-employers); and they necessarily involve, precisely because they are effective, agreement or combination among competing orchestra leaders and other businessmen, such as booking agents, for the purpose of preventing competition at prices below the minimum prices promulgated and enforced by the petitioning Unions.

A. *Nature of Union price tampering.* Three separable Sherman Act violations *concerning prices* are involved in the instant cases: (i) naked price-fixing unilaterally\* imposed by AFM and its Locals as Union bylaws, and en-

---

\* The words, "unilateral" and "unilaterally", have sometimes been used ambiguously in the course of this litigation both by the litigants and the courts. In one sense, the Union price-fixing, insofar as it results in actual market prices which conform with the price-fixing mandates contained in Union bylaws, was not and is not unilateral, i.e., conduct attributable to the Unions alone. There are two reasons for this. In the first place, the Unions' minimum *prices* (and wages) are often formulated at so-called "Price List" meetings, attended by leader-employers, as Union members who participate in the discussions and actions at the meetings resulting in formulation and promulgation of minimum *prices* (and wages) (Tr. 141, 143, 257, 252-255, 1253, 1255, 1242-43, 1948-49, 1959-64, 3266, 3301-3303). In the second place, price-fixing by the Unions alone would be an

(Footnote continued on following page)



forced in combination with non-labor groups; (ii) Union-mandated combinations, arrangements or agreements with and among competing orchestra-leader-employers not to compete at prices below those fixed by AFM and its Locals; and (iii) effective Union sanctions upon, and boycott of, orchestra-leader-entrepreneurs who venture to compete at prices below those fixed by the Unions (App. 93-94, 98-99).

1. *Price fixing by Unions and their version thereof.*

Up to the very submissions to this Court, the petitioning Unions never dropped the pretense that they were *not* fixing prices. Obviously, a union which, by its explicit bylaws<sup>\*</sup> or by any other method, effectively requires price-fixing (and suppression of competition) could not possibly *act alone*. For it to *act alone* in respect of price-fixing would be ineffectual loneliness of operation having no effect on the market. No one in the market would pay any attention to a union acting *alone* to fix prices. When the union's efforts at price-fixing actually result in market prices conformable to the union bylaws, we have, as here, actual price-fixing. Once the market thus begins to reflect, on a wide or significant scale, the union minimum prices, this

*(Footnote continued from preceding page)*

empty and impossible gesture. Unless orchestra-leaders-employers and booking agents respected and enforced Union prices by charging them to purchasers of music, there would be no fixed prices *in the market for musical services*.

In another sense, the Union price-fixing is literally and clearly *unilateral*, insofar as it takes the form of a promulgation by the Union of "Price Lists" which are *bylaws* formulated either by Price List meetings or by the Executive Board of Local 802 (when a quorum is not available for a Price List meeting). Union minimum prices are never promulgated as the act of a Price List meeting or as the act of the Executive Board of Local 802. They are only promulgated as a Union bylaw, which is the act of the Union, not of any group within the Union. That bylaw (*E.g.*, Plaintiffs' Exhibit 187, Tr. 28) is then enforced by the Union in combination with many types of employer-businessmen.

\* Plaintiffs' Exhibits 187 through 195; 173 through 177; 161 through 164; 205 through 209; Defendants' Exhibit CM; App. 93.

means, at the very least, that those who sell musical services thus priced have adopted, agreed with or simultaneously fallen in line with the union-promulgated prices. In this way they have *ipso facto* and necessarily combined or collaborated with the union. This reasoning is backed by extensive proof in the Record from both plaintiffs' witnesses and defendants' witnesses demonstrating that AFM and Local prices are widely and faithfully adhered to (Tr. 10-11, 17; 84; 89-90; 137; 166-67; 206-07; 214; 230; 249-250; 290-298; 656-664; 813, 828, 862-863, 968, 1061-62, 1172, 1223, 1345, 1667-73, 2201, 3009, 3653-3655; especially 274) throughout the musical industry.

During all of the prior litigation, and especially during the trial (Tr. 749, 3673; 62; 669-670), the specious argument of the petitioning Unions was, nevertheless, that they merely fixed wages never prices. Before the Court of Appeals and even before this Court, as before the Trial Court, the petitioning Unions maintained that the minimum prices imposed by them were nothing more than "the aggregate of the minimum compensation payable to sidemen and leader" (Petition for a Writ of Certiorari, p. 5; Tr. 3673). Defendants' own admissions (App. 77: Plaintiffs' Exhibit 388, ¶¶ 13 and 4, which are admissions made pursuant to request for admission under Rule 36, FRCP) and (Tr. 3653-3655) testimony of Max Arons, then Secretary and now President of Local 802, demonstrate that contention is false. Moreover the error of this argument was also exhibited by the Cross-Petitioners' Brief, pages 8-9.

The stark price-fixing by petitioning Unions, in combination with orchestra-leader-employers and other non-labor groups, literally *permeates* the Record. It covers both single and steady engagements, *i.e.*, all musical engagements (Tr. 17, 54, 55, 89-90, 137, 139, 145, 180-181, 242-46; 252-54, 265-66, 273-74, 374, 419, 449-51, 472-73, 532-533, 641-43, 656-658, 662, 669-673, 695, 706, 748-49, 813, 828, 843, 862-63, 937, 968, 996, 1001-05, 1061-62, 1102, 1122, 1133, 1172, 1223, 1242-1243, 1253-55, 1301-02, 1345, 1362, 1368-69, 1391-

91A, 1594, 1633, 1650-67, 1667-1673, 1680, 1700, 1729-30, 1839, 1948-49, 1959-64, 2029, 2182-84, 2201, 2472-75, 2505-06, 2510, 2534, 2536, 2567-68, 2729, 3009, 3163, 3266, 3301-2, 3303, 3317, 3381-3382, 3493-94, 3626, 3653-3655, 3673-75, 3727-28, 3845),

The District Court, obviously recognizing that the Union conduct amounted to price-fixing, engaged in specious, speculative arguments, devoid of support in the Record, for the purpose of justifying the Union's price-fixing.<sup>7</sup>

<sup>7</sup> The following quotations from the Trial Court's opinion demonstrate this:

(1) " \* \* \* If they [orchestra leaders] undercut the union wage scale or do not adhere to union regulations regarding hours or other working conditions when they perform, they will undermine these union standards. They would put pressure on the union members they compete with to correspondingly lower their own demands \* \* \*." (emphasis added)

Here the Trial Court seems to be taken in by the Union pretense that the minimum prices imposed by the Unions were really aggregates of wages; because the "union wage scale" and the "union regulations" are *Union bylaws* which on their face mandate price-fixing.

(2) " \* \* \* Any cuts by participating leaders of their fees below a union minimum or in the price of an engagement below a union minimum \* \* \* puts an obvious downward pressure on the wages of subleaders and sidemen." (emphasis added)

Here the Trial Court was obviously trying to excuse bald Union price-fixing which is enforced in combination with many employer-businessmen.

(3) " \* \* \* It is unquestionably true that skimping on the part of the person [orchestra leader] who sets up the engagement so that his costs are not covered is likely to have an adverse effect on the wages paid to the participating musicians. \* \* \*"

Here again reference is obviously to Union price-fixing, where what is "likely" is strangely equated to what is "unquestionably true".

(4) The Trial Court avoided deciding whether the orchestra leader is an employer-businessman or an independent contractor; and merely assumed that orchestra leaders are, ambivalently, *either* (App. 163). As a result, the Trial Court even adopted the

(Footnote continued on following page)

Although the initiative for price-fixing came from the Unions (Plaintiff's Exhibit 187, Local 802 Bylaws, Article VII, especially Sections 4 and 6), it is equally true that many leader-employer-businessmen combined (Tr. 141-143; 252-257) with the said Unions *and with each other under Union auspices*, to violate §§ 1 and 2 of the Sherman Act. The nub of the antitrust violations, therefore, is not merely the existence of Union bylaws, regulations and practices which enforce minimum prices. It includes (i) active participation of employer-businessmen (*i.e.*, orchestra leaders) in the actual formulation and enforcement of those bylaws, regulations and practices at Price List meetings (Tr. 257; 143; 141; 1253; 1255; 1275; 1290; 1948; 1949; 1959-1964; 3266; App. 106 ¶ (23)) and (ii) agreement or arrangement of leader-employers, *inter se*, not to bid against each other at prices below Union minimum prices.

The problem thus presented is *national* in scope; because price-fixing thus formulated and thus enforced is characteristic of every AFM Local through the United States (Tr. 10; 11; 17-18; 2534; Plaintiffs' Exhibit 306; App. 96).

The Sherman Act does not permit leader-employers and leader-entrepreneurs to associate themselves *with their own employees in a labor union* for the purpose or with the effect of promoting the orchestra-leader-employer's business welfare or of regulating the competition and entrepreneurial functions of competing orchestra leaders. See cases cited App. 194. Cross-petitioners have been unable to find

(Footnote continued from preceding page)

Union's artificial denomination of the orchestra leader as a "personnel manager": "Nor is there any evidence which indicates that the increment to the personnel manager is unrelated to his costs in that function."

Here, the Trial Court refers to the *price* of the engagement or to the leader's *profit* as fixed by the petitioning Unions and seems to attempt an excuse for such price-fixing by reference to some sort of unspecific relation between price or profit and the costs involved. The Court below conclusively refuted this reasoning by the Trial Court (App. 197-198).



a single case in which an employer-entrepreneur was placed in a labor-group. All cases are contrary. Even Local 802 President Manuti seemed to know this (App. 99).

All decided cases condemn, and no case justifies, price-fixing by unions, with or without combination with non-labor groups.

2. *The combination of Unions with non-labor groups.* AFM and Local Bylaws are, in legal contemplation, a "contract"; and AFM and its Locals, constituting as they do aggregates of members organized and regulated by the same bylaws and objectives, are "combinations" or the word has no meaning. These combinations encompass not only Union officials, and employees (as is true of all other unions) but also *employer-businessmen*, i.e., orchestra leaders. The very word, "*union*", signifies *combination*.

In the ordinary enforcement of antitrust laws against businessmen only, when there is a contract to fix prices, for example, between a manufacturer and his distributor, the rule of *illegality per se* is justifiably applied. The obvious effect of a series of vertical agreements of this kind is to prevent price competition in the resale of the manufacturer's product by his distributors. Likewise, if the distributors agree among themselves not to compete, the economic and legal effect of such horizontal combination is exactly the same. One would have to be ignorant of the ordinary results of such employer practices to fail to recognize that where systems of vertical and horizontal agreements or arrangements are permitted, the inevitable effect is to increase the profits of distributors by eliminating price competition among them.

In the instant cases, the bylaws, with which each orchestra-leader-entrepreneur agrees to comply as an AFM member, constitute a horizontal agreement or contract to fix and to maintain minimum prices between competing



orchestra leaders and to suppress competition at lower prices (Tr. 17-18; 53; 58-60; 64; 65-69; 137-140; 169-170; 242-246; 274; 290-293; 374; 449; 522; 523; 536; 538; 551; 557; 641-643; 656; 658; 662; 672; 996; 1001; 1102; 1133; 1362; 1716; 1839; 1840-41; 1853). These same bylaws which fix prices also constitute a vertical agreement between orchestra-leader-employers on the one hand and employee-musicians on the other, to prevent such price competition; since *all members* are required by Union bylaws<sup>8</sup> to aid in the enforcement thereof by reporting to the Union deviations from all bylaw mandates, including those concerning prices and competition.

These bylaws constitute a horizontal agreement between orchestra-leader-entrepreneurs themselves to abide by Union-promulgated prices and to avoid, and to report, all competition at prices below said prices.

Orchestra leaders like plaintiffs are more than *mere* employers. See Statement, pages 15-25, *supra*. They are businessmen who operate enterprises for profit in competition with other orchestra leaders. They are entrepreneurs subject to Union rules and practices *which largely govern them in their entrepreneurial roles*.<sup>9</sup> Indeed, the leader is a businessman-employer who differs from other businessmen-employers in that the leader's good will and business are more intimately related to his own personal skill, business acumen and personality than is true of most businessmen. A leader's orchestra, even when it is led by a subleader, depends for its business viability upon

---

<sup>8</sup> For example, Local 802's bylaws contain the following language (Article IV, Section 1(A)(4)(o): "It shall be a violation and detrimental to the welfare of this local for a member to commit one or more of the following acts, all of which are hereby prohibited, viz.: \* \* \*.

"(o) To fail to report within a week to the Secretary knowledge of any violation of the Constitution, Bylaws or Wage Scales of this local." The Unions use "wages" and "prices" indiscriminately (Tr. 46-49).

<sup>9</sup> See footnote 11, *infra*.

the reputation and style of the orchestra leader and upon his ability to attract and to keep customers.

When the leader plays an instrument, as he usually does, he does not displace a sideman. He actually makes the sideman's job possible. To get engagements and thus to provide jobs he must perform in the mode characteristic of orchestra-leader-employers. For example, the name, Guy Lombardo (Tr. 62-64) or Meyer Davis is literally the trademark signifying the quality and value of *any orchestra* performing under that name, even when Guy Lombardo or Meyer Davis is not present. This method of leading while playing is something all professional leaders use. The purchaser is completely uninterested in the names of the sidemen.<sup>10</sup> He chooses a particular band only because of the leader and his reputation, not because of any sideman. The very name of the band is taken from the employer-leader's name. The leader, as a businessman, takes all of the risks (Tr. 411-412, 1021) of the enterprise. He makes an investment in music library, music stands, uniforms, lighting equipment, sound systems, stationery, advertising, etc. Only the leader assumes risk of the purchaser's credit. If the latter fails to pay, the leader nevertheless must and does pay the wages of his sidemen (AFM

---

<sup>10</sup>Said the Court in *Cutler v. United States*, 180 F. Supp. at 362-363:

"The purchaser was interested in the leader, not in the individual musicians, except in rare instances. The leader had established a reputation of putting on good performances. Because of this he was employed—not because of a certain man who played the violin or the trombone. What violinist or trombone player was to be employed was the leader's responsibility. The purchaser was interested only in the overall effect, in the montage, not the individual pictures.

\* \* \*

"It was plaintiff, and not the purchasers who were in the business of providing music at social functions. The success of this business depended on plaintiff's ability and reputation as a musician. He is the one who bears the loss and gains the profit." (180 F. Supp. at 362, 363)

Bylaws, Article 13 § 29, Plaintiffs' Exhibit 162). Only the leader is responsible to the purchaser of the music for performance of his contract of engagement (*ibid.* Article 16 § 19). The leader hires his sidemen, disciplines or discharges them when necessary, and exercises complete control, economic and artistic, over the employment relationship, just as any other employer (Tr. 309-322, 358-379, 492-496, 504-505, 811-817).

AFM and Local bylaws are themselves witnesses of the combination between the Unions and orchestra-leader-employers, because those bylaws, in the sections noted in the footnote, frequently deal not with purely labor matters, but with *entrepreneurial functions of employers*.<sup>11</sup> For

---

<sup>11</sup> A few of these entrepreneurial regulations appear in Plaintiffs' Exhibit 162 (AFM Bylaws), from which the following is *not* an exhaustive selection:

Article 1, Section 5(P); AFM supervision over prices.

Article 7, Section 14; requiring contracts to conform to Union prices.

Article 10, Section 5; price regulation and its sanctions.

Article 11, Section 3; dissemination of price lists.

Article 13, Sections 25-30, 33; regulation of leader-employers' businesses.

Article 14, Section 18; regulation of prices for transfer members.

Article 15, Sections 3, 12, 13, 14, 16 and 17; traveling surcharge regulations.

Article 16, Sections 19, 20; regulation of employers' responsibility.

Article 17, Sections 20 and 21; price and contract regulations.

Article 19, Section 1(C); regulation of price and transportation charges.

Article 20, first sentence; prices for traveling theatrical engagements.

Article 23, Section 2; regulation of TV and Radio contracts.

Article 24, Sections 1 and 5; prices for recording and motion pictures.

Article 25, Sections 17, 23, 25B, Third (f); restrictions on leader-employers' business.

Article 26, Section 7; restrictions on employer-booking-agent relationship.

Article 27, Section 5; regulation of circus engagements.

See also the AFM price lists in Articles 20 through 27.

example, plaintiffs Peterson and Carroll were expelled from AFM and Local 802 because, among other reasons, *they failed to charge their clients the minimum prices promulgated by the Union* and they failed to file engagement contracts in the form prescribed by the AFM.<sup>12</sup>

3. *Unions allow no competition for musical engagements at prices below their minimum prices.* AFM and Local by-laws not only forbid competition by Union members who are leader-businessmen at prices below those contained in Union bylaws (Tr. 293; 3653-3655; 274; 658; 662-663). They also require sanctions against, and eventual expulsion of, a leader who undercuts Union prices (App. 93-94), as plaintiffs Carroll and Peterson, noted above (Tr. 290-298). Such an expelled leader is then subjected to a variety of effective Union boycott and blacklisting gambits. As a follow-up, the Unions forbid sidemen to perform for expelled leaders (Tr. 293-294). This has often forced an expelled orchestra leader to give up his profession.

There is, doubtlessly, a valid distinction between the kind of price tampering which prevents or restrains price competition and the kind which does not. The kind which prevents or restrains price competition is always unjustifiable and is *per se* a violation of the antitrust laws. The Union practices in the instant cases are illustrations of such *per se* violations, as the Court of Appeals ruled with respect to some (too few, say cross-petitioners) of them. The record contains no evidence of any reasonable business or union purpose or actual competitive or other benefit which could justify<sup>13</sup> the types of price-fixing and restraint of trade in which the Unions have been en-

<sup>12</sup> *Carroll v. Associated Musicians*, 206 F. Supp. 462, reversed on other grounds (which later became moot), 310 F. 2d 325.

<sup>13</sup> For example, cross-petitioner, Marty Levitt, was disciplined by the Union for failing to charge his client the Union-prescribed minimum prices. However, at no time did he fail to pay the wage scales unilaterally (and therefore unlawfully) prescribed and mandated by Local 802 (Tr. 579-89, 612-18).



gaging in combination with non-labor groups. Certainly, the Union price-fixing and suppression of competition does not increase efficiency or even prosper the orchestra leader's business; especially since the higher the prices, the less the business for many leaders, who are not well established (Plaintiffs' Exhibit 56). In any event, the Unions prevent free competition between orchestra-leader-employers; and they admit this.<sup>14</sup>

In ordinary industrial practice, this Court has made it clear, contracts or arrangements among competitors to boycott distributors who do not adhere to a maximum resale price are illegal *per se*. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951).

In the instant case, the Union bylaws defining minimum prices constitute not only an agreement but a *stimulus* for competing orchestra leaders to boycott those orchestra leaders who do not adhere to the prices enforced by the Unions in combination with non-labor groups. Obviously, such bylaw agreements when carried to performance are aimed at the destruction of weaker orchestra-leader-employers (who can't, on their own, command even union *minimum prices*), the prevention of competition and the coercion of Union members, as well as non-member purchasers of music, to deal only with leader-employers who adhere to the Union rules respecting price-fixing and suppression of competition.

B. *Discussion of cases.* Brief discussion of eight cases decided by this Court demonstrates that labor's exemption from the antitrust laws is not available to the petitioning Unions.

1. *U. S. v. Brims*, 272 U. S. 549 (1926), held that violence was irrelevant under the Sherman Act. Certain local manufacturers of mill work, who used union carpenters, found their business threatened by competition

<sup>14</sup> See Defendants' Admission, ¶ 63 and ¶ 14, page 81 of the Appendix (Tr. 293, 3653-55).



from non-union mill work. Because the union involved deemed this situation a threat to its wage structure, it agreed with the building contractors that union carpenters would not be required to work on non-union mill work. This arrangement certainly smacked of secondary activity; and it was obviously motivated by a desire to prevent non-union goods from competing with union products. Therefore, this Court found the arrangement illegal under the *Second Coronado* case (*Coronado Coal Co. v. U.M.W.*, 268 U. S. 295 (1925)) and under previous secondary boycott decisions. The *Brims* case, having been decided in 1926, came about six years prior to the Norris-LaGuardia Act. Nothing in the opinion in *Brims* or in a subsequent case involving similar facts (*Local 167, I.B.T. v. U. S.*, 291 U. S. 293 (1934)) indicates that they went beyond secondary boycott cases or the *Second Coronado* case.

In the *Apex* case (*infra*), Mr. Justice Stone was to leave no doubt as to the continued vitality of the *Brims* case as a precedent, because he referred to it as a "case of a labor organization being used by combinations of those engaged in an industry as the means or instrument for suppressing competition or fixing prices" (310 U. S. at 501). But Mr. Justice Stone's reference to *Brims* appears to be inaccurate; since the union in *Brims* was *not being used by any employer* but was actively protecting its own organization and its wage scale. The union's conduct in *Brims* was directly related to collective bargaining in which the involved union and employers had engaged; because the exclusion of the non-union products was actually essential to the maintenance of the union scale set forth in the collective bargaining agreement.

In the instant cases, the Unions had no collective agreement, and never engaged in bargaining, with orchestra leaders.

2. *Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc.*, 311 U. S. 91 (1940). This involved the

"vendor system", developed during the depression. Vendors bought milk from non-union dairies and sold it to retail stores, enabling the latter to cut the price of milk. The Milk Wagon Drivers Union, which was an AFL organization, thought that this method of distribution was injurious to its members. Therefore, it picketed the stores which handled milk under the vendor system. Windows were broken and other types of violence occurred during the picketing. The vendors themselves and other employees of the dairies organized a CIO union. Eventually, an injunction suit was instituted against the Milk Wagon Drivers Union by the operators of the vendor system. The District Court denied an injunction because the requirements of the Norris-LaGuardia Act had not been met. The Seventh Circuit Court of Appeals reversed the decision, deciding that no "labor dispute" existed; and that the purpose of the picketing was to obtain the abandonment of the vendor system, an issue which the Seventh Circuit thought was unrelated to labor's efforts to improve working conditions. This Court unanimously reversed the judgment of the Circuit Court on an opinion by Mr. Justice Black, who concluded that this was a *labor dispute* because the vendors were for all practical purposes *employee-members* of a union competing with members of the AFL union for employment in the milk industry. The vendor system was definitely related to labor's effort to improve working conditions. The Sherman Act did not nullify application of the Norris-LaGuardia Act to the case. *There was no combination with non-labor groups.* Congress did not intend that what were misinterpretations of the Clayton Act should be repeated in the construction of the Norris-LaGuardia Act. Both unions involved had labor contracts. The CIO labor contract referred to the vendors or peddlers as "employees"; and the employers treated the vendors as employees. What was involved then was a vendor system invented by employers to evade payroll taxes by transforming persons who were originally employees and who were still func-

tionally employees into speciously styled "self-employed" or "independent vendors."

By contrast, orchestra-leader-employers cannot be classified as persons who are functionally or in any other way *employees*. The vendors in the *Lake Valley* case were definitely a labor group. This cannot properly be said of orchestra-leader-entrepreneurs who are employers and businessmen, *i.e.*, they constitute a non-labor group.

3. *Apex Hosiery Co. v. Leder*, 310 U. S. 469 (1940). Under this case, labor unions "to some extent not defined" (310 U. S. at 488) continued to be subject to the antitrust laws. The Sherman Act prohibited *restraints on competition* in the market for *products and services*, as rendered by leaders and their bands. The union's activity had not actually affected price competition in the hosiery market. Therefore, there was no liability under the Sherman Act. This case made no reference to any Congressionally defined immunity for labor organizations. It was decided on straight antitrust law principles, distinguishing *Local 167, IBT v. U. S.*, 291 U. S. 293 (1934) and *U. S. v. Brim*, 272 U. S. 546 (1926), in which unions conspired with, and aided, *illegal combinations of employers*. Thereby, this Court suggested in 1940 that combination with non-labor groups might deprive unions of their exemption. It delineated a corresponding exemption for union activities which involved the *labor* market rather than the *product* market.

AFM and its locals, on the contrary, suppress competition in a variety of ways, especially by enforcing minimum prices.

4. *U. S. v. Hutcheson*, 312 U. S. 219 (1941). Here, this Court squarely faced labor union liability for antitrust penalties.<sup>15</sup>

---

<sup>15</sup> The Court did not apply the commercial *competition* test developed in the *Apex Hosiery* case.

It read the Sherman Act, the Clayton Act and the Norris-LaGuardia Act (the NLRA was not relevant to the case) as a "harmonizing text of outlawry of labor conduct", asserting that Congress, by the Norris-LaGuardia Act, intended to restore to § 20 of the Clayton Act an original broad purpose to remove the "taint" of illegality from such union activities as strikes, pickets, boycotts: "So long as a union acts in its self-interest *and does not combine with non-labor groups*, the licit and illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end to which the particular union activities are the means" (312 U. S. at 232; emphasis added).

To many lower courts, the language just quoted called for blanket exemption for all § 20 activities, regardless of union purpose or effect on interstate commerce or on competition in the product or service market. This indiscriminate application of Justice Frankfurter's formula led to much injustice and confusion.<sup>16</sup> It is not *accommodation* of different statutes but *supplantation* of one by the other. This is not consistent with the totality of union-antitrust rules elaborated by this Court since 1941.

But even before 1945, unions lost their exempt status by combining with non-labor groups (such as employers or businessmen) to suppress competition, *Truck Drivers Local 421 IBT v. U. S.*, 128 F. 2d 227 (8 Cir. 1942); *U. S. v. New York Electrical Contractors Association*, 42 F. Supp. 789 (S.D.N.Y. 1941); *U. S. v. Associated Plumbing*

<sup>16</sup> *Gundersheimer's Inc. v. Bakery Workers*, 119 F. 2d 205 (D. C. Cir. 1941); *U. S. v. Bay Area Painters & Decorators Joint Comm., Inc.*, 49 F. Supp. 733 (N. D. Cal. 1943); *U. S. v. American Federation of Musicians*, 47 F. 2d 304 (N. D. Ill. 1942), affirmed *per curiam*, 318 U. S. 741 (1943); *U. S. v. United Brotherhood of Carpenters*, 313 U. S. 539 (1941); *U. S. v. Building & Construction Trades Council*, 313 U. S. 539 (1941); *U. S. v. Carrozzo*, 37 F. Supp. 191 (N. D. Ill.), affirmed *per curiam sub nomine*; *U. S. v. International Hod Carriers District Council*, 313 U. S. 539 (1941).



& *Heating Merchants*, 38 F. Supp. 769 (W. D. Wash. 1941); *U. S. v. International Fur Workers Union*, 100 F. 2d 541 (2 Cir. 1938), cert. denied 306 U. S. 653 (1939).

In the instant cases, AFM and its locals combine with many non-labor groups to fix prices, to impose commercial restraints, etc.

5. *Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers*, 325 U. S. 797 (1945). In that case, this Court mischaracterized what had been a union-instigated plan to eliminate competitors as one in which the union had been used as a tool to "aid and abet" an employer combination.<sup>17</sup>

In *Allen-Bradley* this Court noted that if the union had refrained from combining with employers, its activities would have been exempt under § 20<sup>18</sup> of the Clayton Act. The collective bargaining agreements in this case were part of a larger conspiracy to monopolize the industry and to fix prices. This Court squarely faced the task of harmonizing the Congressional policy (Sherman Act) of preserving a competitive business economy with the Congressional policy (NLRA and Norris-LaGuardia Act) of protecting and encouraging collective bargaining. The outcome of that reconciliation was the conclusion that labor unions violate the Sherman Act when they aid and abet, or combine with, businessmen to engage in the precise activities forbidden by the Act. *Allen-Bradley* appears to be the first case in which this Court expressly considered the Congressional aim of fostering collective bargaining as relevant in a determination of the applicability of antitrust laws to labor unions.

---

<sup>17</sup> See Opinions of Justices Roberts and Murphy, 325 U. S. at 813, 820. The District Court had made it clear that the scheme had been initiated and forced upon the employers by Local 3 (41 F. Supp. 727, S.D.N.Y. 1941).

<sup>18</sup> Quoted at page 35 of this Brief.



That aim is inapplicable here, because the *petitioning unions never bargain with orchestra-leader-employers*, despite passage of the Wagner Act in 1935 and the Taft-Hartley Act in 1947. They circumvent bargaining by forcing employers into Union membership. *Ipsa facto*, Union bylaws fixing wages (and minimum prices) are as much the obligation of union members (including leader-employers) as any provision of a labor contract might be.

It is, of course, significant for the purposes of the instant antitrust cases that the identical union activities "may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups". (325 U. S. at 810; emphasis added.)

In *Allen-Bradley*, this Court did not precisely define illicit labor-management combinations. As a result, certain lower courts misapplied the *Allen-Bradley* doctrine in cases where employers or businessmen were coerced by unions to boycott other employers or businessmen. *East Texas Motor Freight Lines v. International Brotherhood of Teamsters*, 163 F. 2d 10 (5 Cir. 1947); *Davis Mills Corp. v. Federation of Dyers*, 18 LRRM 11 CCH Labor Cases, 69698, 69704 (S.D.N.Y. 1946). Some courts, however, did not make this mistake. *Westlab Inc. v. Freedom Land, Inc.*, 198 F. Supp. 701 (S.D.N.Y. 1961). On principle, it seems clear that unions which coerce employers into violations of the Sherman Act should be *the more liable* under the antitrust laws. They fit the real, factual situation in *Allen-Bradley*: union combination with victimized businessmen.

A number of lower courts, in applying *Allen-Bradley*, properly and logically regarded collective bargaining agreements as a manifestation of illegal combination. *U. S. v. Milk Wag. Drivers Union*, 153 F. Supp. 803 (D. Minn. 1957); *Lystad v. Local 223, IBT*, 135 F. Supp. 337 (D. Ore. 1955); *Adams Dairy Co. v. St. Louis Dairy Co.*, 260 F. 46, 53 (8 Cir. 1958); *U. S. v. Hamilton Glass Co.*, 155 F. Supp.

878, 884 (N. D. Ill. 1957); *California Sportswear & Dress Association*, 54 FTC 835 (1957).

Most lower courts, on the strength of *Allen-Bradley*, correctly considered the agreement as a *per se* violation of the antitrust laws where (*as here*) it embodied market restraints. *U. S. v. Gasoline Retailers Association*, 285 F. 2d 677 (7 Cir. 1961); *U. S. v. Minneapolis Electrical Contractors Association*, 99 F. Supp. 75 (D. Minn. 1951).

A number of lower courts, taking too narrow a view of the meaning of *union-employer combinations*, thought that collective bargaining agreements could not be held to constitute evidence of an unlawful combination when the employer's participation in the combination was the result of union coercion. *Greenstein v. National Skirt & Sportswear Association*, 178 F. Supp. 681 (S.D.N.Y. 1959), appeal dismissed, 274 F. 2d 430 (2 Cir. 1960); *Pevely Dairy Co. v. Milk Wagon Drivers Union*, 174 F. Supp. 229 (E. D. Mo. 1959), appeal dismissed, 283 F. 2d 519 (8 Cir. 1960); *Galveston Truck Line Corp. v. Ada Motor Lines, Inc.* 35 CCH Labor Cases 97393 (W. D. Okla. 1959). This line of cases illogically neglects (i) the effect of the involved combination, namely, suppression of competition and (ii) the aggravated union culpability in misusing union power for illegal, non-labor objectives.

Other courts properly took an opposing view. *U. S. v. Fish Smokers Trade Council, Inc.*, 183 F. Supp. 227 (S.D.N.Y. 1960); *California Sportswear & Dress Association*, 54 FTC 835 (1957); *McHugh v. U. S.*, 230 F. 2d 252 (1 Cir.) cert. denied, 351 U. S. 966 (1956). They ruled that coercion of the employer might be an excuse for the latter; but in such case the employer could not be for the union or in the union. *Indeed, in none of the cases of lower courts cited above were the employers members of the union.* Cross-petitioners have been unable to find a single case where employers were ever held to be mem-

bers of a *labor group* in the application of the *Allen-Bradley* doctrine.

We have every kind of union combination with non-labor groups (i.e., where the latter are coerced and where the latter cooperate willingly) in the instant cases.

6. *Los Angeles Meat & Provision Drivers Union v. U. S.*, 371 U. S. 94 (1962), where still another type of union combination with non-labor groups was found objectionable. There, some members of the defendant union were *self-employers or entrepreneurs*. They had no proper place in the union, this Court held. See also *U. S. v. Womens Sportswear Manufacturers Association*, 336 U. S. 460 (1949); *Hawaiian Tuna Packers Ltd. v. International Longshoremens Union*, 72 F. Supp. 562 (D. Hawaii, 1947).

Union activities, even those which fell within § 20 of the Clayton Act, always lost their exemption if (*as here*) they were carried out pursuant to an agreement with non-labor groups for *anticompetitive purposes*. *U. S. v. Employing Plasterers Association*, 347 U. S. 186 (1954); *U. S. v. Employing Latherers Association*, 347 U. S. 198 (1954); *Philadelphia Record Co. v. Manufacturing Photo-Engravers Association*, 155 F. 2d 799 (3 Cir. 1946).

It is not necessary that the combination should be the result of an explicit agreement. The involved activities and surrounding circumstances could *implicate* arrangement or agreement. *Interstate Circuit Inc. v. U. S.*, 306 U. S. 208 (1939); *Local 175, International Brotherhood of Electrical Workers v. U. S.*, 219 F. 2d 431 (6 Cir.), cert. denied, 349 U. S. 917 (1955); *U. S. v. Fish Smokers Trade Council, Inc.*, 183 F. Supp. 227 (S.D.N.Y. 1960); *U. S. v. Milk Drivers Union*, 153 F. Supp. 803 (D. Minn. 1957).

The Norris-LaGuardia Act's requirement that union participation be shown by "clear proof" (Norris-LaGuardia Act, § 6, 47 Stat. 71 (1932), 29 U.S.C. § 106 (1964)) was

not forgotten. *United Brotherhood of Carpenters v. U. S.*, 330 U. S. 395 (1947).

In the instant cases union participation is indisputable.

7. *United Mine Workers of America v. Pennington*, 381 U. S. 657 (1965). Here again unions were held not to be exempt under the Sherman Act when they combine with non-labor groups. Even where improper combination "found expression in a collective bargaining agreement", there was no immunity (381 U. S. at 662-63). Likewise, self-interest alone did not immunize the union where the restraint on the product or service market was "direct and immediate" and where the benefit to labor was only indirect (381 U. S. at 663). Even the national labor policy on collective bargaining provided support for the denial of union exemption in a case *where* (as was frequently true in the instant cases) *the union agreed with one set of employers to impose a certain wage scale on another set* (Id. at 666). Mr. Justice White concluded that such agreement was also contrary to the fundamental policy of the antitrust laws; because, if an exemption were provided from antitrust law liability where the agreement was to impose identical wages on weaker employers, it would be practically impossible to deny exemption to discriminatory strategy developed to impose higher wages on competitors.

*Throughout the reasoning of the various opinions in Pennington, price-fixing was always regarded as an illegitimate union objective.*

In the instant cases, petitioning Unions make a habit of agreeing with one set of employers to impose wage scales on another set (Tr. 58-60, 64-69, 74-76, 184, 186-187, 237-238, 278, 1267, 1278-1279, 1292, 3571-3572, 3581).

8. *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U. S. 676 (1965) where the union had tried to



dismiss the complaint on the grounds (i) that the NLRB had exclusive jurisdiction over the complaint and (ii) that the controversy fell within labor's exemption to the anti-trust laws. Mr. Justice White joined by Chief Justice Warren and Mr. Justice Brennan rejected the first contention (that the District Court should have stayed its proceeding pending a determination by the NLRB), because (i) the courts are not without experience in making such determinations; (ii) resolution of the question whether the case involved a "term or condition of employment" would not have been necessary under *Pennington* had the alleged union-employer combination been proven; and (iii) there was no appropriate alternate procedure for obtaining such a determination anywhere else. A single employer, through a collective bargaining agreement with a union, had participated in a union combination with a non-labor group. That fact "does not ~~compel~~ immunity for the agreement" (381 U. S. at 689). In elaborating an accommodation between the conflicting Congressional policies, Mr. Justice White addressed himself to the question whether the marketing hours restriction was "so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision . . . falls within the protection of the national labor policy" (ib. at 689-90). The Court held that evening marketing hours would impair job jurisdiction or substantially alter hours or work load; and in this respect found that the District Court's finding was not "clearly erroneous". FRCP 52(a).

The dissenting opinion of Justices Black, Clark and Douglas concluded that the exemption should have been denied on the authority of *Allen-Bradley*. Mr. Justice Douglas thought that a multi-employer collective bargaining agreement was *prima facie* evidence of a conspiracy among the employers and the unions to "impose the marketing hours restriction on Jewel via a strike threat by the unions (381 U. S. at 736).



Mr. Justice Goldberg, with whom Justice Harlan and Stewart concurred, dissented from the Court's opinion in *Pennington* but concurred in its judgment in *Jewel Tea*. His dissent was really nothing more than a defense of collective bargaining as he, too comprehensively, envisioned it. It obviously provides no comfort for the petitioning Unions in the instant cases, because they do not bargain collectively and have never done so (Tr. 26). Even on Mr. Justice Goldberg's theory, the exemption for provisions in a labor contract dealing with mandatory subjects of bargaining should not extend to those contracts with non-mandatory subjects. He held explicitly that the "direct and overriding" interest of unions in working conditions is "clearly lacking" where the subject of the agreement is "price-fixing" or "market allocation" (ib. at 732-33).

In the instant cases, the unions, for example, negotiate a labor contract with the Hotel and Restaurant Association in New York City. The number of employees of hotels and restaurants who are musicians is negligible. But the hotel and restaurant labor contract is applied to *all orchestra-leader-employers who bring their orchestras to hotels and restaurants in the New York City area* (Tr. 64, 237-238, 277-278, 3581). Thus, the labor agreement between Local 802 and the hotels and restaurants imposes a certain wage scale on other employers with other bargaining units. An agreement to impose certain wage scales on *other* employers is really not concerned with the working conditions of employees in the particular bargaining unit directly involved in the negotiation. Mr. Justice White was therefore on solid ground when he concluded that a union must be denied immunity without regard to predatory intent in such cases; because this type of labor agreement imposes a direct restraint on competition in the product or service market. Also, agreements to impose conditions on *other, non-negotiating employers* interfere with the process of collective bargaining between the union and the negotiating employers.

C. *Critique of certain passages in the opinion below.*  
 Cross-petitioners respectfully dissent from certain findings, principles and reasoning contained in the Second Circuit's opinion:

1. *App. 193-194:*

"\* \* \* the Norris-LaGuardia Act takes all 'labor disputes', as therein defined, outside of the reach of the Sherman Act.

"Appellants contend that this case comes within the rule of *Allen Bradley Co. v. Local 3*, 325 U. S. 797 (1945), which creates an exception to the immunity afforded the unions for those cases in which a labor union combines with businessmen to achieve a commercial restraint."

If the Norris-LaGuardia Act takes *all* "labor disputes" beyond the reach of the Sherman Act, jurisprudence surrenders to the mere *nominalism* of one of the parties; unions which combine with non-labor groups to fix prices, to suppress competition, etc., have only to dream up a "dispute" with an involved employer in order to provide themselves with antitrust law immunity; and there is an end to *accommodating* the Sherman Act to Federal labor laws, because the latter (and the Norris-LaGuardia Act) in effect repeal the former.

*Allen Bradley* laid down no such rule, which finds support in neither law nor reason. "Labor disputes" have an unconscionable scope as *literally* defined. Yet, the Norris-LaGuardia Act did not prevent the *Allen Bradley* ruling, despite the fact that the case exemplified a "labor dispute", if the statutory definition is read with indiscriminate literalism. Courts have found it reasonable, nevertheless, to read the definition of "labor dispute" less rigidly and literally.

2. *App. 194:*

"Under the appellants' view of this case, there is a conspiracy by the unions with 'non-labor' groups to

engage in practices which are unlawful, because they are in restraint of trade. But the facts do not support such a conclusion."

Plaintiffs (appellants) constantly urged not a *conspiracy*, but a *combination*, between defendant Unions and many orchestra-leader-entrepreneurs, booking agents, hotels and others, to fix prices, to suppress competition, to burden commerce unreasonably and to impose other commercial restrictions upon plaintiffs and all *professional* orchestra-leader-employers.

The Court below erred grievously in stating that the facts do not support such a combination. The record is replete with such facts and they were never contradicted. Indeed, defendant Unions, because they include leader-employer-entrepreneurs, are essentially *combinations* or *organizations* of labor unions with non-labor groups. The very words, "union" and "labor organization", connote *combination* and *collaboration*. When such combination or collaboration includes (as here) a labor union and employee-members, on the one hand, and many employer-entrepreneurs, on the other, there is the kind of *combination* forbidden by *Allen Bradley*. Indeed there is, then, an employer association or an organization of businessmen in a trade association *under Union auspices*.

### 3. App. 194:

"For a union's activity to fall outside of the protection of the definition of a 'labor dispute' in § 13 of the Norris-LaGuardia Act \* \* \*, it must be shown that there was a conspiracy with a 'non-labor group'. That principle was reaffirmed by the opinion of the Court in *United Mine Workers v. Pennington*, 381 U. S. 657 (1965)."

A *combination*, as distinguished from a *conspiracy*, is sufficient; and such a combination is massively evident in

the record, which contains no contrary evidence. Nor did *Pennington* hold that a *conspiracy*, rather than a *combination*, with a non-labor group was necessary.

4. *App. 195:*

"In the present case there is no evidence of a conspiracy between Local 802, or the Federation, and orchestra leaders to eliminate competitors, fix prices or achieve any other commercial restraint, nor was such a finding made by the district judge. Rather, the record establishes that all restraints were instituted unilaterally by the unions and acquiesced in by the orchestra leaders. Nor does the fact that the unions reached agreements with non-labor groups—booking agents, recording companies and others—place this case within the exception."

The record does *not* show that *all* restraints "were instituted unilaterally" (See footnote #5, *supra*; and also pp. 68 ff, *infra*) by the unions and that "thereafter these restraints were acquiesced in" by the leader-employers. Leader-employers attended Price List meetings and participated in the very formulation of prices and other restraints (Tr. 252-255, 257, 54-55, 10-11, 17-18). The evidence is that many leader-employers welcomed price-fixing. See the quotation from the Second Circuit's majority opinion, on next page, and Supplement to this Brief, pages S-1 ff, *infra*.

Even if the Unions here always took the initiative without protest from the employer-members, the latter's later acquiescence, and their ensuing combination to comply with and to enforce Union prices and other restraints are a sufficient "combination" within the meaning of the *Allen Bradley* rule. In *Allen Bradley*, too, the initiative came from the union and the District Court found that the non-member employers there had (as the employers here) practically no choice except to comply. In principle, the Second Circuit's reasoning here is fallacious. Under that

reasoning, a union which is more culpable, because it *originates* prices and other commercial restraints and then *persuades* or *coerces* employers to apply them, is guiltless under the Sherman Act. But a union which falls into line with original, employer persuasions or coercions similarly to violate that Act is guilty. It is the *combination* with non-labor groups, not the *origin* of the combination, which is and should be significant under *Allen Bradley*. That is why this Court's error in its majority decision in *Allen Bradley* as to who initiated the commercial restraints—an error pointed out by dissenting opinions—was not particularly important.

The Second Circuit's opinion actually contains language which itself recognizes both *conspiracy* and *combination* between the defendant Unions and non-labor groups:

“\* \* \* *there is evidence that many orchestra leaders are willing members of the union and subscribe to its policies; and there was no evidence offered by the appellants that such a group did not exist. Indeed, the unions' price-fixing programs would assure those who are less successful and well-known of earning at least the union fee when they work instead of the lower sum they might get under free competition. The desire to protect their interests gives them the same motivation that generates most horizontal price-fixing arrangements. Similar economic benefits to orchestra leaders are inherent in other of the unions' regulations, for example, the restrictions on traveling engagements.*” (372 F. 2d at 162, emphasis supplied; App. 192)

It is strange, in the light of the quoted language, that the majority below accepted the manifestly erroneous finding of the District Court that there was no unlawful *conspiracy* or *combination*, especially when one considers the *undisputed* testimony of both Union and non-union witnesses who testified that throughout the United States there is



and for many years was no competition between orchestra leaders (and booking agents who sell orchestras' services) at prices below the minimum prices set forth in AFM and Local Price Lists (Tr. 290-293, 274, 1133, 557, 449, 522-523, 536-538, 970, 996, 1001, 374, 1362, 2184, 10-11, 17-18, 151-152, 137-140). Surely such continued and universal compliance with AFM and Local Price Lists is "conscious parallelism," at the very least, not mere coincidence. It must, indeed be conspiracy, combination or arrangement between the Unions and leader-employers and booking agents in the market for musical services. The very nature of the acts perpetrated by the parties to the combination here manifest them as business restraints: price-fixing, suppression of competition between entrepreneur-leaders, monopolistic regimentation of and interferences with the businesses of entrepreneurs, numerous unreasonable burdens on commerce. Therefore the mere acquiescence of businessmen in such Union prices and commercial restraints in these cases is enough to trigger antitrust law liability in the parties to the combination. *Interstate Circuit, Inc. v. United States*, 306 U. S. 208 (1939); *United States v. Masonite Corp.*, 316 U. S. 265 (1942); *Northern California Pharmaceutical Association v. United States*, 305 F. 2d 379 (9 Cir. 1961), certiorari denied 371 U. S. 862 (1962); *Ball v. Paramount Pictures, Inc.*, 169 F. 2d 317 (3 Cir. 1948). See the booker's license, AFM Bylaws, Plaintiff's Exhibit 162 pp. 165 ff, especially ¶ (f), p. 167.

There are very few cases which deal with employers or entrepreneurs as union members; probably because there are very few unions which tolerate either *employers* or *supervisors* as union members. It would seem, in principle, that membership of employer-entrepreneurs in the very union which has organized their employees is the *crème de la crème of combination* proscribed by the *Allen Bradley* doctrine, because the combination enforces or applies minimum prices and prevents competition below those prices. What is true of prices and price competition in this respect

is equally true of the numerous other types of monopolistic practices which the record attributes to the "combination" in these cases. See this Brief, pages 94-99.

Union regulations (App. 93-94) fix the minimum "leader's money" or remuneration (profit) (Tr. 137, 249) and they insulate leaders from competition by other leaders at prices below the minimum prices fixed (Tr. 290-293) by the Unions. It does not matter who first thought up and *instituted* these unlawful business restraints. They are enforced *by the Unions in combination with leader-employers* and other non-labor groups, especially booking agents. In this connection, Judge Anderson, for the majority in the Second Circuit, makes the word "unilateral" bear too great a burden. The Record shows that the "Price Lists", which are Union bylaws (App. 93) and which prescribe the Unions' minimum prices and their suppression of competition below those prices, originate from "Price List" meetings. With one exception (Plaintiffs' Exhibit 219), during all of the time covered by the complaints herein, orchestra-leader-employers attended those Price List meetings and participated in the deliberations which resulted in the Unions' minimum prices and suppression of competition. Thus, the words "unilateral" or "unilaterally" are ambivalent in this connection. It is correct and accurate to say that *the Union unilaterally* fixes minimum wages; because what the Price List meeting does (or what the Executive Board of Local 802 does) is later promulgated by the Union as the act of *the Union*. However, the process of fixing prices *before their formal promulgation as Union bylaws* involved leader-employer participation in their formulation and collaboration of the Union with leader-employers at Price List meetings. In that sense, precisely because leader-employers thus actively collaborate in the fixing of prices, it is somewhat ambiguous to speak of the Unions' *unilateral* price-fixing and suppression of competition.

Judge Anderson accepted the District Court's finding that there was no *conspiracy* between the Unions and the

leader-employers to restrain trade and to fix prices. Maybe there was no "conspiracy" in a technical sense, or in a sense that those who participated in the Price List meeting (including leader-employers) were conscious of an unlawful objective. But there was most certainly *combination and arrangement* between the Unions and the leader-employers both at the stage when minimum prices were being formulated and at the stage where minimum prices and competition suppression were enforced. However, the actual promulgation of the Union bylaws imperating suppression of competition at prices below the Union-fixed prices was a unilateral Union action, even when it was the result of action by the Local 802 Executive Board.

Therefore, the undisputed evidence in the Record contradicts the finding of the Courts below that there was no conspiracy or combination between the Unions and the leader-employers to restrain trade, to fix prices and to suppress competition.

The professional orchestra leaders in the class here involved are businessmen. The fact that they acted as a group in collaboration with the Union should not obscure the further fact that they worked together within their group or class for the purpose of aiding enforcement of minimum prices and for the purpose of suppressing competition. Indeed, if they merely acquiesced in those prices and in the other Union arrangements for the suppression of competition, their combination, arrangement or conspiracy in violation of the antitrust laws would be clear (*Northern California Pharmaceutical Association v. U. S.*, 305 F. 2d 379, 387 (9th Cir., 1961), cert. denied 371 U. S. 862 (1962); *Interstate Circuit Inc. v. U. S.*, 306 U. S. 208 (1939); *Local 175 International Brotherhood of Electrical Workers v. U. S.*, 219 F. 2d 431 (6th Cir.), certiorari denied, 349 U. S. 917 (1955); *U. S. v. Fish Smokers Trade Council, Inc.*, 183 F. Supp. 227 (S.D.N.Y. 1960); *U. S. v. Milk Drivers Union*, 153 F. Supp. 83 (D. Minn. 1957).)

5. *App. 195:*

"Nevertheless, there is a narrower ground upon which the legality of the unions' activities must be tested. If the unions coerced orchestra leaders with regard to a matter which is not a 'term or condition of employment', they would not be exempt from the provisions of the Sherman Act, because the Norris-LaGuardia Act affords immunity from the impact of the anti-trust laws only for 'labor disputes'; it does not provide a blanket exemption."

In this connection, cross-petitioners make two comments:

(1) The combinations here involved coerce orchestra-leader-employers with respect to *many additional things, other than price-fixing*, which, on their face and essentially, are not "terms or conditions of employment". See, for example the 54 items appearing at pages 94-99 of this Brief. Indeed, the AFM Bylaws are very largely given over to matters which in no sense are such "terms or conditions". According to defendants' own admissions, these bylaws are generally enforced as written (Tr. 151-152); and they are enforced by defendant Unions (Tr. 20-21, 25-26, 166-167, 151-152) and by leader-employers (Tr. 8). It is inconsistent to exempt from the Sherman Act only price-fixing by the combination because price-fixing is not, admittedly, a "term or condition of employment"; and then to fail to exempt *other monopolistic conduct* of the same combination, even though that other conduct is equally neither a term nor condition of employment.

(2) The Norris-LaGuardia Act does not, under proper and reasonable construction, afford immunity from liability under the Sherman Act in every "labor dispute" excogitated by an interested union. As pointed out above, this would mean not a reconciliation or harmonizing of the two Acts, but a supplantation of the Sherman Act by the

Norris-LaGuardia's literal (and in some contexts quite irrationally inclusive) definition of "labor dispute". That definition is in many respects the key to the statute. The courts have been forced, therefore, even as early as the 1930's, to modify the rigid literalism of the definition by rules of reason: *Oberman & Co. v. United Garment Workers Union*, 21 F. Supp. 20 (D. C. Mo. 1937); *California State Brewers Institute v. Teamsters*, 1-A LRRM 661; *Waterfront Employees of Portland v. C.I.Q.*, 1-A LRRM 568; *Fehl Baking Co. v. Bakers' Union*, 20 F. Supp. 691 (D. C. La. 1937); *Donnelly Garment Co. v. International Ladies Garment Workers*, 21 F. Supp. 807 (D. C. Mo. 1937), reversed on jurisdictional grounds, 304 U. S. 243 (1938) and 20 F. Supp. 767 (D. C. Mo. 1937); *Retail Food Clerks v. Union Premier Food Stores*, 98 F. 2d 821 (Cir. 8, 1938); *Grace v. Williams*, 96 F. 2d 478 (Cir. 8, 1938); *Dean v. Mayo*, 9 F. Supp. 459 (D. C. La., 1934), affirmed 82 F. 2d 554, *Pauly Jail Building Co. v. International Association*, 29 F. Supp. 15 (D. C. Mo. 1939).

It would take no great ingenuity for any labor union leadership interested in unlawful combinations forbidden by *Allen Bradley* to invent a "labor dispute" for the very purpose of making the rule of that case ineffectual. That would be the triumph of literalism over the true administration of justice and a reversion to sterile conceptualism and nominalism as canons of statutory interpretation. It would give a magic efficacy to an incantation, "labor dispute".

6. *App. 200-201:*

"A closed shop dispute \* \* \* concerns a term or 'condition of employment' and therefore is exempt. \* \* \* As a union's pursuit of a closed shop is protected, the accomplishment of its objective cannot be declared to be a violation of the Sherman Act."

A closed shop is *not* a legitimate term or condition of employment, since it was banned in 1947 by the Taft-Hartley Act.



Therefore a union's pursuit of a closed shop is not protected; and the accomplishment of that unlawful objective should, in the context of these cases, be declared a violation of the Sherman Act. Moreover, the Second Circuit seems erroneously to reason that a "term or condition of employment" is *ipso facto* exempt under the antitrust laws, regardless of the legality of the term or condition involved.

Furthermore, the closed shop, whenever it was lawful in decided cases, never involved (except in the instant Unions) coercion of the *employer* into any union; least of all into the same union with his employees. This fact, alone, would differentiate the present case from any precedents cited by the Second Circuit.

7. In considering the Unions' refusal to bargain with orchestra leaders and their activities in putting pressure on orchestra leaders to become Union members, the Court of Appeals, it is respectfully submitted, committed a number of critical errors:

(a) It held that "Whether unfair labor practices were committed \* \* \* must be considered in the first instance by the National Labor Relations Board on complaint of the General Counsel?" (App. 201). But no unfair labor practice was ever presented to the courts by plaintiffs, who very well understand that NLRB has exclusive jurisdiction over such matters. Plaintiffs contended that the defendant Unions' refusal to bargain with orchestra leaders, and their pressures on orchestra-leader-employers in combination or collaboration with non-labor groups, constituted exercises of predatory, monopoly power violative of the Sherman Act. In applying the Sherman Act, it is not necessary first to obtain a ruling from the NLRB. *Vaca v. Sipes* (87 S. Ct. 903, 914-915).

(b) "A labor union's refusal to deal has been held to be exempt in the absence of a conspiracy with businessmen.

*Hunt v. Crumboch*, 325 U. S. 821 (1945).” (App. 201-202). There is no requirement that there be a *conspiracy*. A *combination* or *arrangement* with non-labor groups is enough. There was combination in these cases. For example, there are so-called labor contracts between Local 802 and the hotels, nightclubs and restaurants of New York City. Orchestra leaders, not privy to such contracts or to the negotiations leading up to them. Nevertheless, leader-employers who play in hotels, nightclubs and restaurants are bound by that contract (Tr. 237-38; 276-78). See Cross-Petition for a Writ of Certiorari, § 9, p. 25 ff.

(c) “Moreover the purpose behind the Unions’ action makes it apparent that there is no violation involved. Unlike *Hunt v. Crumboch*, \* \* \* refusal to bargain here is not aimed at eliminating a competitor from the product market, but rather achieving uniformity of labor standards” (App. 202). This statement contradicts undisputed evidence given by Max Arons then Secretary and now President of Local 802 (Tr. 3240, 3656-3657).

One of the obvious purposes and certainly one of the unavoidable effects of refusing to bargain and of forcing orchestra leaders into the Union was to maintain such a monopoly power as *would prevent collective bargaining about wages, hours and working conditions* and as would therefore leave wages, hours and working conditions to government by unilaterally promulgated Union bylaws, enforced in combination with many types of employers-businessmen. This manifest objective is coupled with one equally apparent: to eliminate from competition the non-union orchestra leader who was not subject to Union bylaws.

(d) “The exertion of pressure on orchestra leaders to join the Union reflects a legitimate Union concern for the closed shop \* \* \*” (App. 202). This somewhat inexplicable statement neglects the fact that the closed shop is unlawful

under Federal Statute and that a Union concern for the closed shop cannot, therefore, be legitimate.

(e) " \* \* \* and is not to be confused with cases in which labor unions have imposed membership upon employers who do not present job threats to union members. See, e.g., *Los Angeles Meat & Provision Drivers v. United States* \* \* \* " (App. 202).

This, of course, *assumes* (against uncontradicted evidence in the record) that orchestra leaders do not present job threats to Union members. On the contrary, they are providers of jobs for Union members. See Cross Petition for Certiorari, § 10, pp. 26 ff; Brief in Support of Cross-Petition, pp. 15-19.

8. "The same leaders who are 'employers' in the club date field are very often employees when they perform as sidemen or subleaders or when in other fields the purchaser of music is actually the employer" (App. 202). However applicable the foregoing comment may be to hundreds of Union members *who improvise as orchestra leaders*, those comments have no application whatever to plaintiffs or to the full-time professional orchestra leaders constituting the class of persons who function as do plaintiffs. Here, again, the Second Circuit failed to read the record accurately insofar as it pertained to plaintiffs and to professional orchestra leaders like plaintiffs. The majority failed to take into account the fact that plaintiffs never work as sidemen, except Marty Levitt, who did so two or three times a year and then only as an accommodation for a fellow orchestra leader who suddenly needed a replacement. Perhaps the majority was misled by the concurring and dissenting opinion of Circuit Judge Friendly. Judge Friendly was at pains to give a description of "orchestra leaders" which generally had absolutely no relevance to the plaintiffs or to the class represented by plaintiffs:

" \* \* \* Beginning with the single sideman leading himself, this ranges through the sideman who picks up

two or three engagements a year [like Max Sontag] as leader of a larger group, the performer who spends a fair portion of this time as leader, the musician who does nothing but lead, and the exclusive leader having several bands with engagements at the same time, up to the few leaders who have ceased to lead at all. Obviously, this means a high degree of interchangeability in work functions and competition among Union members for posts as leaders." (App. 204)

Whatever the accuracy of this description to others it has no application whatever to the plaintiffs or to the class represented by them. None of the plaintiffs is interchangeable with sidemen or vice versa. Nor is there any competition among Union members for posts as leaders which can lawfully be protected by Union action. The Union simply has no business to attempt to protect competition between leaders for jobs, *i.e.*, engagement contracts, as leaders. Nor does it have any business to protect sidemen-turned-leaders when they seek to compete as leaders with other orchestra leaders.

9. *App. 196:*

"Here, of course, since the unions do not bargain with orchestra leaders or with music purchasers in the club date field, the union's protective provisions do not, as in *Jewel Tea*, appear in agreements with employers. They are, instead, unilaterally adopted by the unions and complied with by the orchestra leaders because of the threats of retaliation present in the unions' by-laws. The policy considerations are, however, the same.

*Jewel Tea* was the product of collective bargaining, which defendant Unions here have always spurned and eschewed. How, then, can the policy considerations be the "same" for the purposes of appraising, against "labor

dispute" criteria, the defendants' bylaws and activities? How can *dictatorial imposition* of "terms and conditions of employment" be equated to elaboration thereof by *collective bargaining*? There could be a question whether a collective agreement amounts to exercise of monopoly powers by the contracting parties, where they confined *their bargain* to mandatory subjects for bargaining. There appears to be no question whatever about the monopolistic character of defendant Unions' combination with non-labor groups in these cases, where the Unions join with businessmen (who are Union members) for the purpose of autocratically *imposing* all sorts of economic conditions *as well as* wages, hours and working conditions, without dealing with such businessmen in any way except as Union-employer-members (who are always outvoted by employee-members).

The Second Circuit, after measuring the Unions' conduct by "labor dispute" criteria, concludes, rather irrelevantly in view of the utter absence of collective bargaining in these cases:

"Thus, in the absence of an illegal conspiracy, mandatory subjects of collective bargaining carry with them an exemption; the national labor policy demands that the parties be permitted freely to reach agreement on terms and conditions directly affecting the working man." (372 F. 2d at 165; App. 153, #123)

That conclusion is surely inappropriate here, where the parties were not at all free to reach an *agreement*, since the leader-employers were robbed of such freedom by unilateral bylaws covering (i) mandatory subjects of bargaining; (ii) non-mandatory subjects of bargaining and even (iii) lawfully impermissible subjects, *e.g.*, price fixing. The Court's quoted conclusion completely neglects even the unmistakable combinations both between union and employer groups and among employer-businessmen *inter se*.



The Court correctly finds that under the "labor dispute" test, price-fixing is outside the scope of proper union function. The decision of the Court below also validly distinguishes the *Oliver* case from the instant cases (372 F. 2d at 166):

"The circumstances constituting a possible threat to the employment of sub-leaders or the displacement of a sideman in the present case are not at all comparable. Nor is there any authority for holding that an employer must bargain on a labor union's demand that the employer perform no work himself which an employee could do. Moreover, many leaders become so because of their skill and reputation in playing certain instruments and their performances with their orchestras enhance the demand for the orchestras and provide more work for employees rather than less as is the case of 'contracting out'. (372 F. 2d at 166)

However, two pages later (372 F. 2d at 168) Judge Anderson, suggests against undisputed facts in the record, that professional orchestra leaders like plaintiffs are "job threats" to Union members. Therefore he concludes that pressure on orchestra leaders to join the union reflects a legitimate(!) labor interest in a closed shop, "and is not to be confused with cases in which labor unions have imposed membership upon employers who do not present job threats to union members" (372 F. 2d at 168). This suggestion is totally inconsistent with his earlier finding that job competition or other relationship between leaders and sidemen or sub-leaders cannot justify price-fixing. The Union regimentation of business decisions and functions properly belonging to leader-employers is often completely unrelated to "terms or conditions of employment". The economic or other benefit which many leaders derive from their Union affiliation makes the very structure of the Union and not just its price fixing activity, subject to attack under the antitrust laws. Membership of leaders

in the Union, whether voluntary or coerced, stifles competition in a wide range of business functions and limits the economic freedom of leaders as businessmen, which the Sherman Act protects.

10. *App. 200:*

“ \* \* \* local unions have a direct interest in protecting the job market for their workers, cf. *Rambusch Decorating Co. v. Brotherhood of Painters*, 105 F. 2d 134 (2 Cir.), cert. denied 308 U. S. 587 (1939) \* \* \* ”

(1) The *Rambusch* case came (in 1939) long before Congress (in 1947) imposed on unions the duty to bargain collectively. In any process of harmonizing texts of partially inconsistent statutes that duty to bargain ought to be considered now, even if it could not be a factor in 1939. For a union today to fix even minimum wages by means of enforced bylaws is to prevent or to hinder collective bargaining.

(2) In any event, the *employer* in *Rambusch* was not included in the union's bylaws fixing minimum compensation. Defendant Unions here fix minimum compensation for *employers* and employees.

(3) Even if unions have a direct interest in protecting the job market “*for their workers*”, they do not have a proper interest in protecting the “job market” for *employers*.

(4) The Unions' interest “in protecting the job market for workers” does not exempt them from the duty under NLRA to bargain, nor from the duty under the Sherman Act to avoid price-fixing, suppression of competition, etc., in combination with non-labor groups.

11. *App. 195 and 200:*

“As neither the travel restrictions nor the employment quotas were instituted in furtherance of a con-

spiracy with a non-labor individual or group, they are immune under the Norris-LaGuardia Act."

This reasoning flies in the face of the undisputed facts in the record, many of which are evidence supplied by defendant Unions. Besides, the Union travel restrictions and employment quotas here are not isolated phenomena. They are a part of a system of regulations and combinations with non-labor groups which, taken as a whole unmistakably violate the Sherman Act as construed in *Allen Bradley*.

It is obvious, for the same reasons that made the doctrine of "conscious parallelism" a reasonable part of anti-trust law, that travel restrictions and employment quotas could not possibly be effective or even significantly observable in the market for musical services (where they are widespread), unless they were imposed and complied with by many combinations between defendant Unions and non-labor groups. This rational induction or deduction from undisputed and indisputable record facts is supported by much testimony (Tr. 89-90, 146, 163-166, 237-238, 274, 278, 295, 374, 449, 464-465, 469-473, 522-523, 772 ff). As to travel restrictions the combination is between the Unions and leader-employers (Tr. 163-166, 237-238, 278, 449, 457, 1102) and booking agents (Tr. 522-523, 557, 996-1001, 1102-1105, 2505-2506). As to employment quotas, the combination is between the Unions and leader-employers (Tr. 8, 457, 469-473, 772-773, 1001, 2338-2339, 2348, 2357, 2404 ff), hotels (Tr. 278, 464-465, 469-473, 895, 2205-2206, 2215, 2338-2340, 276, Plaintiffs' Exhibit 241), and caterers (Tr. 772-773, 2348, 2357, 2404-2405).

Nor are the travel restrictions here, except by self-interested union nominalism, properly designated by defendant Unions as "terms or conditions of employment." Real "terms or conditions" must be bargained, or at least there must be a good-faith attempt to bargain them by the

Unions, if there is to be exemption from the Sherman Act because of the Norris-LaGuardia Act. Most of the travel restrictions, and all of the 'minimum' quota rules here, are also *price-fixing* rules, or regulations to suppress or to regiment competition between leader-entrepreneurs. (Plaintiffs' Exhibits 178-185). It is also pointed out below respecting travel restrictions. Both of these two types of Union regulations necessarily increase the leader-entrepreneur's profit and therefore the price to the public. The apparently similar union rules in the cases cited by defendant Unions and by the Courts below are not really the same. The court cases on union employment quotas came, mostly, before unions were required to bargain about such matters. They never included the *employer* in their prescribed quotas, as do all of the Union rules here on "minimums" (See Plaintiffs' Exhibits 178-185). Inclusion of the leader-employer in these Union bylaw "minimums" necessarily means inclusion of the *employer's* profit in the price.

As to travel restrictions, none of the cited cases involved unions which invited or coerced employers into membership or which were trying to protect both *employers* and employees against the respective kinds of competition affecting them.

Employment quotas were instituted and maintained by the Union-employer combinations here in the only way which could have made them effective: by and for combinations between the Union on the one hand and orchestra-leader-employers, hotels, nightclubs, restaurants, caterers and booking agents on the other hand. Employment quotas, as put into practice by the Unions, always benefited orchestra leaders by increasing their profits. Part of the quota being the leader himself, the purchaser always had to pay the "leader's fees" or profit (App. 103-104, Nos. (17) & (18)). It is uncontradicted that the AFM travel restrictions, set forth in AFM bylaws were instituted partly



for the purpose of preventing competition with local orchestra-leader-employers and their employees.

12. The Court of Appeals regarded the Union *travel restrictions* and *employment* quotas as quite different from Union price-fixing, "• • • because both are mandatory subjects of collective bargaining and reflect union interest in maintaining the job market" (App. 200). But neither Union interest in the job market nor the fact that travel restrictions and employment quotas are mandatory subjects of collective bargaining justifies or excuses violation by the petitioning Unions of the Sherman Act *in combination with non-labor groups*. In the first place, whether something is or is not a *mandatory subject of collective bargaining* has no possible relevance here, since admittedly defendant Unions never engage in collective bargaining with leader-employers (Tr. 26). In the second place, the *Allen Bradley* case reflected definite union interest "in maintaining the job market." But that did not prevent this Court from striking down its combination between the union and the businessmen to flout the antitrust laws. In the third place, no cases justify the kind of employment quotas mandated by the Union bylaws. The cases which regard employment quotas as "terms and conditions of employment" or as mandatory subjects of *collective bargaining*, concerned employment quotas from which *employers* were *excluded*.

13. The Second Circuit also erred in reasoning as follows:

"• • • since the employers do not remain within the jurisdiction of any Local when they are traveling, the only realistic way to achieve Local security is through the enforcement of restrictions of the national union."  
(App. 200)

This neglects the obvious facts that *collective bargaining* is a realistic way to achieve "local security"; and that



collective bargaining is something the defendant Unions never tried. Moreover, even if it be true that only enforcement of national union restrictions is realistic, such enforcement of the Unions' unreasonable restrictions on interstate commerce, in combination with non-labor groups, becomes unlawful when it is aimed at or when it results in protecting local orchestra-leader-entrepreneurs from competition by other orchestra-leader-entrepreneurs hailing from different Locals.

Moreover, the issue does not concern merely *unqualified travel restrictions* but whether the nation-wide traveling restrictions imposed by AFM are or are not *reasonable burdens on interstate commerce*. There may be cases which show that specific union travel restrictions are not unreasonable burdens. They do not answer the question whether the cumulative, extensive and complicated burdens imposed by AFM on orchestra-leader-employers are or are not unreasonable (e.g., Tr. 162 ff; 146-51).

14. *App. 201:*

"The appellants also contend that the unions merely by requiring orchestra leaders to use their Form B contract violate the anti-trust laws. This contract serves primarily as a reporting device which enables them to insure against violations of wage scales and other regulations. The use of such a standardized contract, without more, does not under ordinary circumstances constitute an unreasonable restraint of trade; if there are specific provisions in it which do, the complaint should so allege."

The Court here neglects the extensive, important and undisputed evidence which shows that the Form B contract is primarily a means for enforcing Union prices, and other commercial restraints (all contained in Union by-laws incorporated by reference in the text of each Form B contract), in addition to unilaterally mandated wages and working conditions. Besides, to say that the Form B con-

tract is "primarily a reporting device which enables them [the Unions] to insure against violations of wage scales and other regulations," means little unless those "other regulations" are reviewed in this connection. The face of the Form B contract (Defendants' Exhibits Z) demonstrates that the "other regulations" are bylaws fixing minimum prices. The price of the engagement is reported (Tr. 669-670, 1633) in the Form B contract, which contains a false designation of the purchaser of the music as "employer" of the orchestra, and which explicitly incorporates, by reference, all AFM and Local bylaws (including those which offend antitrust laws)! These do restrain trade.

15. *App. 201:*

"The charges concerning the unions' refusal to bargain with orchestra leaders and their activities in putting pressure on them to become union members constitute allegations of prima facie violations of the National Labor Relations Act. See Labor Management Relations Act of 1947, 61 Stat. 140, adding §§ 8(b)(3) and 8(b)(4)(ii)(A), 29 U.S.C. §§ 158(b)(3), (b)(4)(ii)(A) (1959). Whether unfair labor practices were committed, however, must be considered in the first instance by the National Labor Relations Board on complaint of the General Counsel."

As pointed out earlier, these "charges", when augmented by the unlawful combinations to which defendant Unions are parties, also constitute allegations of *prima facie* violations of the Sherman Act in the light of *Allen Bradley*. The Courts, therefore, not the NLRB, should, in the first instance and later, consider them, since the NLRB has no jurisdiction over antitrust matters.

16. *App. 202:*

"\* \* \* each time a non-union orchestra leader performs, he displeases a 'union job' with a 'non-union job'." (Citing *Milk Wagon Drivers' Union* case.)

This egregious error of fact, law and reasoning neglects the uncontradicted and indisputable facts that:

(1) Employers have no proper place in the very unions which have organized their employees. If "supervisors" were excluded by Congress from bargaining units, employers, *a fortiori*, should be. Congress apparently failed to make the exclusion in statutory language simply because unions which coerced employer-entrepreneurs into membership are as rare as mares' nests.

(2) Orchestra leaders supply union members with jobs (Tr. 352, 491-492, 702, 779).

(3) Unless the leader performed as such, he could not gain or maintain his reputation and clientele as an orchestra leader, and therefore he could not provide jobs for employee-musicians.

(4) The right of an employer to function *as such* is as deserving of protection under the labor laws as the right of employees to join unions. The employer's duties—where essential for the maintenance of his business—are not terms or conditions of employment (App. 99). As Simon says ("*The Big Bands*"):

"Many of the big swing bands were built around the leaders and their instruments—around the clarinets of Goodman and Artie Shaw, the trumpets of Harry James and Bunny Berrigan, the trombones of Jack Teagarden and Tommy Dorsey, the tenor sax of Charles Barnet, the pianos of Ellington and Count Basie and the drums of Gene Krupa." (p. 4)

"But of all the factors involved in the success of a dance band—the business affairs, the musical style, the arrangers, the sidemen and the vocalists—nothing equaled in importance the part played by the leaders themselves. For each band it was the leader who assumed the most vital and most responsible role. Around him revolved the music, the musicians, the

vocalists, the arrangers and all the commercial factors involved in running a band, and it was up to him to take these component parts and with them achieve success, mediocrity or failure." (p. 7)

That's the way it is in the music industry. Whether your band is a success, a failure or a mediocrity, to try to make bands function in some other way, *e.g.*, without leaders having the right to do what is for them idiosyncratic, is like making General Motors function without executives or with executives subject to union dictation as to what executives may do. This can't be done without killing the goose that lays the golden eggs of job opportunities for union members and others.

It must be noted that orchestra leaders are like many other employers who perform work which is in some respects *similar* to, but not the *same* as, their employees'. For example, employers who are lawyers, architects, jewelers, engineers, designers, plumbers, electricians, sculptors, painters, cartoonists, accountants, tax consultants, judo experts, stock brokers, real estate brokers, beauticians, factors, editors, store-keepers and many other businessmen, do work which is recognizably similar to that performed by their employees. Indeed, the work done by the executives of large corporations is similar in kind to that performed by many corporate employees in the higher echelons. In all these categories, the employees are often capable of doing some of the work actually performed by their bosses. But the indisputable facts just stated do not mean that the employees are interchangeable with the employers, or that unions representing employees have a legitimate union interest in preventing employers from doing work that employees may do in the areas of work characteristic of and essential to the employer's functioning as such.

Unions might and do have an interest in preventing supervisors and executives from working at production jobs, thus displacing production employees represented by those

unions. But unions have no right to interfere with or to limit employers and executives from doing what they must do to build and maintain their businesses.

All professional orchestra leaders do the four or five things quoted from Simon's book ("*The Big Bands*") at pp. 24-25, *supra*. One of these is, most obviously, to *lead the orchestra*, either by playing an instrument or by waving a baton. For a union to try to stop either of these ways of leading under the pretext that "working orchestra leaders" displace employee musicians, is to prevent such leaders from doing their own essential and distinctive work—work which not only makes a success of the orchestra but also provides work for union members.

17. *App. 202:*

"\* \* \* Judge Levet found that no significant pressure to become members has been exerted by the union on Carroll and Peterson, the two plaintiffs who manage orchestras but do not perform."

To say this is to misunderstand, radically, what an orchestra leader is; what the record says (without contradiction); what a competent and impartial expert like Simon says of orchestra leaders; and what any informed layman knows of orchestras and leaders. An orchestra leader *must* perform. If he is confined to managing, he degenerates into a mere business manager, a role which, however important, is by far second to the role of the orchestra leader. An orchestra leader *leads* or he is not a *leader*. He leads in two ways: by using the baton (or his arms), without playing an instrument or by playing an instrument in the manner described by Simon with respect to Count Basie ("*The Big Bands*," pp. 85-86), as quoted above p.

Judge Levet's finding not only has no support in the record; it *contradicts* all the record evidence on this subject. Carroll was persecuted as a non-member, precisely



because he was not a member in good standing (Tr. 1771-1775, 294, 298, 3681-3684). Local 802 denied him musicians because he was a non-member (Tr. 165, 151-152). He could not do what a leader does most typically; he could not *lead* (Tr. 1937, 298, Plaintiff's Exhibit 355). Union bylaws penalized him as an expelled member (Plaintiff's Exhibit 162, p. 106 § 2, p. 87 § 5, p. 87 § 7). He had to replace himself as a leader (Tr. 1775-1781). What was true of Carroll was true of all non-member leaders. See *Cutler case*, 164 NLRB No. 8.

If Carroll's efforts to avoid persecution by rejoining the Unions were rebuffed, that was merely for the predatory purpose of punishing Carroll (*Carroll v. Associated Musicians*, 206 F. Supp. 462; Plaintiff's Exhibit 355) and of holding him up as a horrible example of what happens to leaders who kick over the Union traces.

18. *App. 202-203:*

"Union by-laws prohibit the members from accepting engagements with or making any payments to caterers. Whether such a regulation is exempt from the Sherman Act may depend upon the effect on the terms and conditions of union members' employment of the bookings with, and kickbacks to caterers. But the appellants have not shown that they were injured by the regulation. There is nothing in the record which tends to establish that the appellants suffered a loss or reduction in engagements or that they were confined to less profitable contracts because of their inability to deal with caterers. The appellants, therefore, lack standing to challenge the lawfulness of the regulation. Clayton Act § 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1959)."<sup>10</sup>

The "terms and conditions" thus referred to are quite irrelevant, since they properly imply collective bargains and collective bargaining, which are non-existent for orchestra leaders. Is it necessary to show an injury where

the plainest inferences from record evidence spell out such injury? Admittedly, under Union bylaws, leaders may not solicit business from caterers and the latter may not hire leaders and their bands (Tr. 3248-3250). Is not this a restraint of trade which on its face imports injury, reduction in engagements and loss of business? Despite Union bylaws, the record shows that some orchestra leaders paid caterers substantial fees for the caterers' promise to recommend them to patrons of the catering establishment (Tr. 2355-62). Surely other, might constitute an unfair labor practice, is also this is some measure of loss to other leaders.

## POINT II

### (Addressed to Question 2)

**The restrictive Union practices of which plaintiffs complain are enforced and maintained by petitioning Unions in combination with non-labor groups. Therefore, they constitute antitrust law violations, whose resemblance to unfair labor practices is irrelevant.**

A. As was explained above, combination between the petitioning Unions and employer-businessmen is inevitably and inextricably involved wherever price-fixing, as here, is effective as a market reality (App. 93-99).

These employer-businessmen are the following: collaborating leader-employers (Tr. 706), booking agents (Tr. 996), personal managers (Def. Ex. CM, Art. 25), hotels, restaurants and nightclubs (Tr. 60, 881 ff), TV and radio (Tr. 2255), caterers (Tr. 2404-2407), recording companies (Tr. 62, 420-422, 1491-1492, 1533, 2779, 3596, 3597, 430-432, 3551, 2699, 1069, 1536-1542), steamship companies (Tr. 1859 ff), many varieties of purchasers of music (Tr. 1144 ff, 2082, 2447), advertising agencies (Tr. 80), motion picture companies (Tr. 2984 ff), transcription companies (Tr. 2954), Class C places using steady engagements

(Tr. 3572-74, 3492, 1694, 689, 3495), theatres (Tr. 3351-55), music publishers (Tr. 2984 ff) and arrangers (Plaintiffs' Exhibit 195).

B. The Court below (372 F. 2d 155, 167) concluded that certain conduct of petitioning Unions cannot become factual ingredients of antitrust-law violation (along with *combination with non-labor groups*), because these ingredients appear to constitute *unfair labor practices* under the NLRA (App. 200).

Cross-petitioners contend that, under the *Allen Bradley*<sup>19</sup> rule, the same Union conduct which spells out an unfair labor practice under the NLRA can also, under the anti-trust laws, articulate monopolistic and restrictive practices violating the Sherman Act, *provided they are committed in combination with non-labor groups*.

The petitioning Unions have violated the Sherman Act along two distinguishable lines of activity:

(i) Activity which, even though under one aspect or another it might constitute an unfair labor practice, is also monopolistic activity violating antitrust laws, executed *in combination with non-labor groups* (an ingredient which is irrelevant to the existence of an unfair labor practice).

At least six different species of Union activity fall into this line:

1. *Union regimentation or coercion of employers (orchestra leaders) requiring them to become and remain members of the same AFM Locals which have organized their employees* (App. 93-96). This could not possibly happen without combination or arrangement between the Unions and many leader-employer-businessmen (Tr. 8, 129, 164-65, 1427, 1775-81; *Doerner-Glasser* cases, 165 N.L.R.B. No. 110; Plaintiffs' Ex-

<sup>19</sup> *Allen-Bradley Co., Inc. v. Local 3, IBEW*, 325 U. S. 797 (1945).

hibit 246). The attorney for cross-petitioners has been unable to discover *any* unions (outside AFM and its Locals) which have or exercise monopoly power, as complete as petitioning Unions, to force the vast majority of employers in an industry into union membership. Orchestra-leader-employers are one of the largest groups of employers in the musical industry. All of them have been coerced or required to become Union members, in the same Local which has organized their employees. A clear Congressional intent, explicitly expressed in the NLRA, to exclude "supervisors" from bargaining units should not permit *employers* in such units. But AFM and its Locals have, and exercise, monopolistic power such that they have organized (and thus they combined with) practically *all employers in the musical field*; i.e., orchestra-leader-employers who willingly or with reluctance comply with AFM bylaws. In addition, the Unions regiment in great detail all booking agents in the musical field. They publish a long list (Plaintiffs' Exhibit 215) of such agents, sub-agents and personal managers as part of their regimentation. Exercise of such power for 30 or 40 years is an unmistakable exhibition of restrictive, monopolistic power and practice. Passage of the Taft-Hartley Act in 1947 in no way mitigated the extent or altered the quality of such monopoly power in violation of the *Allen-Bradley* rule.

2. *Refusal by the petitioning Unions, during the past 30-40 years, to deal or bargain with orchestra-leader-employers*; despite the fact that said Unions always purport to represent the employees of such orchestra leaders. When a union, in combination with non-labor groups, can impose its unilateral dictates upon most of the employers in an entire industry, without so much as dealing or bargaining, the exemplification of monopoly power and its exercise are shockingly manifest (Tr. 62-63; 26; 93).

3. *The petitioning Unions pretend to represent both leader-employers and their employees. They have maintained this pretense for more than 30 years. Such conflicting and inconsistent "representation" (Tr. 3657-3660; 508) could scarcely be established or maintained over a national industry during a period of three or four decades unless it had been backed up by the exercise of monopoly power in combination with many employer businessmen (Tr. 26; Cutler case, 164 N.L.R.B. No. 8).*

4. *Unilateral and effective establishment by petitioning Unions of minimum wages, hours and working conditions for every musical event in the entire musical industry. Such a long-standing, nation-wide system of union prescriptions could not possibly obtain for 30-40 years, unless exercised in combination with many employer-businessmen who submit to Union dictation in these matters. (Plaintiffs' Exhibits 187-195, which are Local 802 Price Lists, 197, 198, 205, 206, 209, 264-269, 429).*

5. *Imposition of closed shops throughout the United States, despite the Taft-Hartley Act's ban on closed shops beginning in 1947. Certainly it demonstrates exercise of monopoly power for a union, in combination with many orchestra-leader-employers, to do with impunity what Federal law and agencies were in part established to prohibit. Again, closed shops could not possibly exist, as they do, throughout the musical industry, unless leader-employers complied with Union rules on the subject (Doerner and Glasser cases, 165 N.L.R.B. No. 110; Tr. 84, 161, 164, 895, 2205-06, 2344, 1706, 1469, 2348, 2314-15, 1102-05, 2086; App. 93-96).*

6. *Unlawful exaction from leader-employers by the petitioning Unions (and by other AFM Unions) of dues and work taxes to the tune of millions of dollars annually. This is nationwide evidence of the exercise of*



monopoly power. Normally, unions which accept monies or other support from employers are properly called "assisted unions": In the instant cases, the petitioning Unions were for many years assisted and operated as such deliberately, with impunity and throughout the United States. (*Cutler v. AFM*, 231 F. Supp. 845, affirmed 316 F. 2d 546, cert. denied 375 U. S. 941 (1963).)

7. *Employer "domination" of those AFM Locals wherein elected officials are leader-employers* (Tr. 141-43). See footnote 21, p. 97 of this Brief, *infra*.

Each of the foregoing seven kinds of activity can be regarded in whole or in part as an unfair labor practice. With equal reason, each must be regarded as an exercise of sheer monopoly power in combination with employers and businessmen. This is especially true because the same Unions also engage in many additional activities which are unadulterated violations of the antitrust laws, without any connotation whatever of violation of the NLRA or any other labor law. This is apparent from the next section, listing in part the second line of objectionable Union conduct.

(ii) The following line of Union practices, is pure and simple violation of the antitrust laws:

(1) Price-fixing in combination (Tr. 252-257) with many employers and businessmen, as the Court below correctly found (Tr. 180-181, 264-270, 374, 419, 532-533, 557, 656-658, 662, 1061-1062; App. 93-94, 197).

(2) A Union system of pseudo-arbitrations (Tr. 118-120) foisted upon the whole industry by Article 9 of the AFM Bylaws (Plaintiffs' Exhibit 162). That system obligates employers, employees, purchasers of music, booking agents and others. Indeed, it could not possibly be made to work as it has been working unless leader-employers, employee-musicians, purchasers of

music, booking agents and others collaborated with the Unions to make it work (Tr. 118-121).

(3) Unreasonable burdens on interstate commerce, imposed by the petitioning Unions despite the fact that the cumulative weight of these burdens is enormous and very expensive to the public (Tr. 265-268, 1664-1666, 2549-2551, 286-287, 145, 280-285, 163-166, 270, 3405; App. 95-96).

(4) Unreasonable, restrictive regimentation by AFM bylaws and Local bylaws, of leader-employers and purchasers of music throughout the United States (App. 93-99). This regimentation is illustrated by footnote 11, above, and pages 94-99, *infra*. Still other types of regimentation are designed to prevent competition among orchestra leaders at prices below the Unions' minimum prices (Tr. 89-90; 164-65; 3653-3655; 290-294).

(5) Unilateral, arbitrary imposition of minimum-employment-quotas upon orchestra leaders and purchasers of music, with the necessarily implied cooperation of many employer businessmen. Such employment quotas necessarily increase prices to the public; because, under AFM and Local by-laws, the leader-employer himself is counted as one of the musicians to be reckoned in the Union's minimum quota. For example, the Grand Ballroom of the Waldorf Astoria requires, for certain functions, under Union bylaws, a minimum of twelve musicians. Whether the leader-employer leads his orchestra or not, he is regarded as one of the twelve. Therefore, his "minimum leader's money", which is required by the Union bylaws, must *always* be included in the minimum price charged to the client for the engagement. The leader-employer may not, under Union bylaws, waive this item of Union-decree minimum profit for the leader (Tr. 104-105, 275, 3237, 137, 249, 457, 464-465, 469-473, 772-773, 1700-1701, 1722-

1723, 1976-1978, 2066, 2121, 2215-2217, 2338-2339, 2357, 2569, 2677, 2678; Plaintiffs' Exhibits 178-185, Miniums Booklets).

(6) Unreasonable restrictions on competition, imposed by the petitioning Unions on employers and purchasers of music, and enforced in combination with non-labor groups (Tr. 161-66, 151 ff. 146-151, 158-159).

(7) Rigid control over booking agents (Tr. 130-32) by an AFM licensing system under Article 25, AFM bylaws (Plaintiffs' Exhibit 162) to insure price-fixing and other commercial restraints.

(8) The imposition of mileage fees by Local 802, which must, under Union rules, be included in the price of the engagement. Since the mileage fee applies to the leader under Union rules (Tr. 270). The price is *pro tanto* increased. (Tr. 264-270.)

C. The Second Circuit erroneously thought (App. 200-201) that plaintiffs, in claiming that the Federation is an unlawful monopoly (in combination with non-labor groups), centered that claim on Union closed shop practices (Tr. 294, 2086, 1102, 1105, 2314-2315, 2348, 2205-2206) only. Actually, plaintiffs' claim of union monopoly was never so restricted before the Courts below. It embraced not only price-fixing (Tr. 10-11, 970), suppression of competition (Tr. 281, 389, 968, 1172, 1223) and unreasonable burdens on interstate commerce (Tr. 265-268, 1664-1666, 2550-2551), but Union practices like the following, all of which required, and in fact were carried out by, combination with non-labor groups (Tr. 8; 22-25):

(i) Requiring use, in all engagement-contracts between leader-employer and client, of provisions mandated by Article 34 of the AFM Bylaws.<sup>20</sup>

---

<sup>20</sup> In this list, references to "AFM bylaws" are to Plaintiffs' Exhibit 162 and to Defendants' Exhibit CM, except where otherwise indicated.

- (ii) Requiring use of the Form B contract (Defendants' Ex. CM; Article 13 § 33).
- (iii) Applying and enforcing Article 25 of the AFM Bylaws concerning booking agents and other matters.
- (iv) Requiring Union approval of all leaders' contracts for musical services with purchasers of music (AFM Bylaws: Article 16, § 1 and Article 17, § 1 (Tr. 656)).
- (v) Restricting entry of non-Union orchestras and orchestra leaders into the field of musical entertainment (Tr. 1706, 1469, 1105, 895, 161, 298, 165, 2435, Plaintiffs' Ex. 187, pp. 66; Rule 24; Defendants' Ex. CM: Article 13, §§ 5, 7; Article 18, § 26; Article 25, §§ 4, 22; Ex. 165; Article 4, §§ 4, 5 (p. 45)).
- (vi) Enforcing Article 16, § 1; Article 17, § 1 of the AFM Bylaws, requiring disclosure of the entrepreneur's prices and other trade secrets of employers.
- (vii) Negotiating recording wage scales with four large recording companies in the United States (*Columbia, Capitol, Victor and Decca*) and thereafter imposing the contract and wage scales thus negotiated upon all other recording companies and all orchestra-leader-employers, who wish to make recordings (Tr. 58-63).
- (viii) Coercing all orchestra-leader-employers to become members of defendant Unions and inflicting penalties (including refusing them Union sidemen) unless they remain members in good standing of defendant Unions (Article 13, §§ 5 and 7; Article 18, § 26; Article 16, §§ 2, 3, 4; App. 93-96).
- (ix) Insisting that no orchestra leader be permitted to accept an engagement from any agent unless said agent is licensed by AFM (Article 25, § 4).
- (x) Enforcing a bylaw forbidding orchestra leaders from directly or indirectly acting as a leader (and from making any contract or entering into service as such) with or for anyone, unless consent thereto is first given by the

Executive Board of the Local (Article 25, § 22; Article 4, §§ 4, 5 (p. 45); App. 97).

(xi) Creating the Executive Board's right, under Local 802 Bylaws, *to cancel a leader's contract with his client* if that contract fails to comply with Union "laws" (Plaintiffs' Exhibit CJ, p. 15; Tr. 1205-33; 1395-1425).

(xii) Requiring, from orchestra leaders who wish to make recordings of the performances of their orchestras, an AFM license, which AFM retains the right to refuse (Tr. 169-170; Plaintiffs' Exhibit 162, Article 24, §§ 6, 7).

(xiii) Using labor agreements between AFM or Local 802 and third parties as contracts which defendants enforce *against leader-employers* (Tr. 276, 295, 1238, 3563-64).

(xiv) Fixing and enforcing minimum employment quotas in a discriminatory and arbitrary fashion (Tr. 1700, 1722-23, 1976-78, 2066, 2121, 3243 ff; 3538).

(xv) Enforcing against AFM booking agents Union regulations which limit competition among orchestra-leader-entrepreneurs (Tr. 131-32, 546-47, 2007, 1238, 994 ff, 1091 ff; AFM Bylaws, Article 25, § 25-B, Third, (f)).

(xvi) Permitting some orchestra-leader-employers discriminatory dispensation from the obligation to use "Form B" contracts (Tr. 665-66).

(xvii) Arranging with caterers that they discriminate against non-Union orchestras (Tr. 772-73, 777-78).

(xviii) Using the spurious "arbitration" procedures imposed by Article 9 of AFM Bylaws (Tr. 118-21) under which AFM stands to gain financially by ruling against one of the "arbitrating" parties (Tr. 118-121, 20-21).

(xix) Dealing with the *largest* annual purchaser of music (all single engagements) in the United States (Tr. 2030), Samuel W. Rosenblum, Trustee, so as to cause discrimination in distributing engagements and in dispensing fees and wages for engagements under the *pretense* that



the leader-employer (along with the sidemen) is an "employee" of the Trustee (Tr. 2009 ff; 1574 ff; 3866 ff).

(xx) Asserting Union jurisdiction over "former members" (Plaintiffs' Exhibits 68, 69, 135).

(xxi) Requiring or tolerating racially segregated Locals for Negroes (Tr. 3645-46).

(xxii) Refusing to deal or bargain with leader-employers (Tr. 26-29; 93).

(xxiii) Applying to leader-employers labor contracts to which they were not privy and in whose negotiation they never participated (Tr. 60-63; 69-70; 81-82; 2581; 184; 237-38).

(xxiv) Arbitrarily regarding leader-employers as "employees" (Tr. 64, 3342-3347) of the purchaser of music, thus causing serious I.R.S. problems for leader-employers (Tr. 971-975).

(xxv) Permitting orchestra-leader-businessmen and employers to be elected officers of AFM (Tr. 141).<sup>21</sup>

(xxvi) Boycotting non-members on TV (Tr. 161).

(xxvii) Forbidding sidemen from playing with a leader-employer who is not a Union member (Tr. 164-65; App. 95).

(xxviii) Requiring AFM licenses for any entrepreneurs who want to make recordings (Tr. 169-70).

(xxix) Giving AFM supervision over prices to be charged to clients by leader-employer-businessmen (Tr. 180).

(xxx) Prohibiting "package" deals with caterers and hotels in the single engagement field (Tr. 3246, 3696).

---

<sup>21</sup> Just before going to press on this Brief, the cross-petitioners were informed that the General Counsel of the N.L.R.B. is about to issue a complaint based on charges that defendant Local 802 is "dominated" and "assisted" in violation of § 8(a)(2) of the Act.

(xxxi) Incorporating price and wage rates and other standards in bylaws and printed booklets unilaterally published by defendant Unions (Tr. 53).

(xxxii) Limiting leader-employer's right to use the "corporate form" of doing business (Plaintiffs' Exhibit 162, Art. 25, § 21).

(xxxiii) Pretending that the leader hires his own sidemen as "agent" for the purchaser (Tr. 211) and that the leader is a Union "shop steward" (Tr. 3670-3671).

(xxxiv) Forbidding investments in shows by leaders (Tr. 289; Defendants' Exhibit CM, Art. 25, § 25).

(xxxv) Unilaterally changing Union bylaws so as to require changes in engagement contracts calling for price increases from the leaders' clients (Tr. 1853-1858a; App. 96, 98).

(xxxvi) Union prohibition forbidding caterers from hiring musicians (Tr. 3248-3250).

(xxxvii) Arbitrary classification of establishments (where music is played) by the Local 802 Executive Board (Tr. 1249).

(xxxviii) Union publications of expulsions of leaders with the purpose or effect of causing boycotts of such leaders (Tr. 3390).

(xxxix) Discriminatory allocation of engagement contracts by the City of New York on recommendations by Union leaders (Tr. 1581-1586; 1604).

(xl) Forbidding leaders on steady engagements from accepting single engagements (Tr. 2435).

(xli) Requiring a leader and subleader or two leaders where two bands alternate in the same room (Tr. 3321).

(xlii) Arbitrary Union conduct such as that which ended Peterson's Victor Herbert and Sigmund Romberg Musicales (Tr. 1980 ff) and which interfered with Carroll's performance in the Jade Room (Tr. 1709-1711).

(xliii) The Union claim of right to inspect leader-employers' contracts with their clients (Tr. 167, 3446, 214, 672-673, 641-643, 656, 3668). The real reason behind this claim is to enforce Union prices and price lists (Tr. 662, 658; App. 97).

(xliv) The Union regulations that all engagement contracts between leaders and their clients must incorporate Union bylaws and rules (Tr. 166-167, 3385; Plaintiffs' Exhibit 162, Art. 34).

(xlv) Union's claim of right to approve orchestra leaders (Tr. 296-297).

(xlvi) Union prohibitions of (a) *gratis* performances by orchestra leaders and (b) supplying singers *gratis* by leaders (Tr. 250, 139).

(xlvii) Union rules and complications concerning the splitting of orchestras by leaders (Tr. 162).

(xlviii) Union regulations and rates concerning augmented bands (Tr. 3729-3731).

(xlix) Union imposition on leader of the "benefits" of collective bargains negotiated "for him" by the Union (Tr. 3656, 3657).

(i) The Union pretense that the 8% surcharge is "part of scale" (Tr. 3674).

(li) The Union's unilateral, arbitrary method of changing classifications from Class C to Class A establishment (Tr. 3624, 689) and of requiring the Form B contracts for Class C houses which must be signed by the *owner* as "employer" of the musicians who perform there (Tr. 3572).

(lii) Forbidding its sidemen-members from performing in orchestras led by non-Union leaders (Tr. 165, 1937, 298, 3734-3738, 129-131, 1775-1881; App. 93, 95).

(liii) Forbidding leader-employers from owning other orchestras or owning a share in other orchestras.

(liv) AFM's pretention to the right to cancel leader-employer's contracts (AFM Bylaws, Art. 18, § 32).

## POINT III

## (Addressed to Question 6)

**There is no relevant competition between professional orchestra leaders and their employee musicians.**

The Trial Court's Finding No. 35 reads as follows:

"Such musicians who work as sidemen in club date or non-club date fields perform as leaders in the hotel steady and club date fields. They bid for the same jobs as full-time leaders such as plaintiffs and perform the same musical service when they get a job. They also perform in the same places as full-time leaders (2291, 2553-54, 2571, 2395-96, 2411-12, 2422-23, 2427, 2428-30, 2874-75, 2889-90, 2894, 3038-40, 3052-54, 3088-89, 3293, 3653-54, 3666-68, Exs. 58, DE, pp. 188-89, HE; F. F. 29)."

The Appendix gathers together and comments upon the pages of the Trial Transcript cited by the Trial Court; so that this Court can conveniently check the utterly inadequate factual foundation for the quoted Finding.

The Finding is radically based on two fundamental errors of reasoning and law by the Trial Court:

(1) The Trial Court neglected the indisputable fact that when a *sideman* bids for an engagement *as a leader*, he ceases being a sideman *pro tanto* (Tr. 212, 224, 3661-3662). He competes with other leaders *as an orchestra leader*, not as a sideman, when he books an engagement as an orchestra leader. When this sort of competition involves a *sideman who is trying to become a leader* on the one hand and an established orchestra-leader-employer with a reputation in his profession on the other hand, it may be very one-sided (and even negligible to the established leader). But if it is competition at all, it is competition for the same musical engagement *by leaders*, or by a leader and a would-be leader, in which the Union has no right

to intrude. It is competition "to obtain jobs as leaders" (Supplement, *infra*; p. S- ) or "to secure jobs as leaders" (p. S- , *infra*) as Mr. Arons put it. Indeed, Union bylaws forbid a sideman from filing a contract of engagement as such. He must file as a leader. Plaintiffs' Exhibit 162, Art. 16, § 5. See Defendants' Exhibit Z, the "Form B" contract. No leader ever competes with his sideman *qua* sideman for a job; and no purchaser contracts for a musical engagement with a sideman as such. This is true even if the sideman-turned-leader is only a leader *ad hoc* and *pro tem*. See Cross-Petition, Section 10, pp. 26-33; Cross-Petitioners' Brief, pp. 15-18; 18-19; Brief for Plaintiffs-Appellants in the United States Court of Appeals for the Second Circuit, pp. 69-72 (Tr. 3654; 3661-3662).

(2) But if it is competition at all, it is *competition for engagement contracts*, not for employee job opportunities. The cross-petitioners do not and never did identify themselves with the majority (Tr. 3667-3668) of the Local 802 members who, on occasion and sporadically, file contracts of engagement with the Union. That majority in Local 802 totals 8,000-10,000 according to variant testimony by Union officials (Tr. 212, 224, 3661-3662). In one year they filed 55,000 to 60,000 engagement contracts with Local 802. (Tr. 660). Cross-petitioners are concerned simply with the minuscule class of *professional* leaders, who like plaintiffs, have established businesses, who never or very rarely play as sidemen (and then only as an accommodation to a fellow orchestra leader) and who derive their livelihoods from working as orchestra-leader-entrepreneurs (Plaintiffs' Exhibit 58). Such leader-employers, are never really bothered by competition from sidemen, whom responsible and discriminating clients obviously will not choose for their weddings, bar mitzvahs, business socials, dinner music occasions, social dances, etc.

Professional leaders in Local 802 number less than 400 or 500. Their businesses are so well established that competition from sidemen who improvise occasionally as



leaders (usually for friends or relatives) is either entirely non-existent or is negligible and meaningless. *E.g.*, Max Sontag, whom the Unions trotted out as an "orchestra leader", admitted on cross-examination that he performed as a leader some nine times in three years! During the trial, *the Unions never produced as a witness a single professional leader with an established business as such or with a sufficient following to enable him to earn a livelihood solely as an orchestra-leader-entrepreneur!* No such leader could honestly testify in support of the Unions' artificial theses respecting competition, "employee" status, etc.

(3) The excerpts from the Transcript on which the District Court relied according to its Finding No. 35, furnish no support *whatever* for three statements in that Finding: (i) that sidemen "bid for the *same jobs* as full-time leaders such as plaintiffs"; (ii) that sidemen "perform the *same musical service* when they get a job" as leaders; and (iii) that they "also perform *in the same places* as full-time leaders." (emphasis added)

Not one single allegation of these alleged similarities appears in any part of the Transcript. Certainly, no such affirmation can be found in the excerpts cited by the Trial Court in its Finding No. 35, and collated in the Supplement to this Brief.

In a few instances, witnesses (none of whom were professional orchestra leaders) called by defendant Unions tried to leave the impression that they had bid against professional orchestra leaders like plaintiffs, on a few piddling occasions (Supplement to this Brief, p. S-1 ff). In doing this, some of the witnesses were manifestly relying on hearsay (Supplement, pp. S-9, S-11, S-12, S-13, S-14), vaguely remembered and diffidently asserted. In other passages, these same witnesses, who were largely professional sidemen without standing or reputation as orchestra leaders, testified that they had at times unspecified, alternated from the role of sideman to the role of

"orchestra leader", without having regular employee-musicians for their orchestras (Supplement, *passim*). The Supplement to this Brief quotes the testimony of these Union witnesses.

However, even if their testimony and their hearsay be taken as Gospel truth, the unassailable fact remains that they at no time enunciated anything whatever about "the same jobs", or "the same musical service" or the "same places". Moreover, when a sideman adopted the role of an "orchestra leader" on occasion, it was *in that role only* that he bid for jobs as a leader, that he obtained and filed with the Union an engagement contract, and that he performed the engagement. Thus, if there was competition, no matter how negligible, between these *ad hoc* and un-reputed "orchestra leaders" and orchestra leaders like plaintiffs (who denied the existence of such competition), the said sidemen-turned-leaders competed to acquire "jobs as leaders", to use Mr. Arons' language (Supplement, p. S-15).

#### POINT IV

(Addressed to Question 7)

**Orchestra-leader-employers who function like cross-petitioners constitute a true class under Rule 23 (a) (1) FRCP; even though the professional orchestra leaders in that class constitute only a very small group within the petitioning Unions.**

The Second Circuit set forth these reasons for coming to the conclusion that no true class of professional orchestra-leader-employers exists:

(1) " \* \* \* There is evidence that many orchestra leaders are willing members of the Union and subscribe to its policies" (372 F. 2 at 162; App. 192).

(2) " \* \* \* the Unions' price-fixing programs would assure those who are less successful and well-known of earning at least the Union fee when they work instead of the

lower sum they might get under free competition. The desire to protect their interests gives them the same motivation that generates most horizontal price-fixing arrangements" (373 F. 2d at 162; App. 192).

(3) "Similar economic benefits to orchestra leaders are inherent in other of the Unions' regulations, for example, the restrictions on traveling engagements" (372 F. 2d at 162; App. 192).

Cross-Petitioners respectfully submit that the foregoing three reasons are not and should not, in principle, be cognizable at law or in equity. Each of the three reasons presupposes an unlawful motivation against the Sherman Act, in those "many orchestra leaders" who are "willing members of the Union and subscribe to its policies." The fact that many leader-employers benefit from being members of AFM and benefit from its price-fixing does not and should not prevent professional orchestra leaders from being integrated into a true class under Rule 23(a)(1); any more than the existence of laborers (in a bargaining unit) who despise unions and who have no sympathy with the objectives of the NLRA, destroys the existence of a class of laborers.

It is true that many professional leader-employers are willing and cooperative members of AFM and subscribe to all its policies, both the legal ones *and the illegal ones*, like price-fixing and restraints on competition of the type which yields them advantages. Indeed, these facts are cornerstones for the cross-petitioners' case; they show that the Unions here do combine with (among others) many leader-employers to fix prices and to suppress competition. There could hardly be better evidence of the *Allen-Bradley* kind of *combination* than employer-entrepreneur membership in the Union, and all of the month-to-month collaboration which this entails.

But that *combination*, even where it includes the kind of diversity of interests to which the Second Circuit referred, does not negate or minimize the existence of a true

class of professional orchestra leaders. They, whether they prefer Union price-fixing or not, are nonetheless a class. The desire and interest of some members of the class to violate the Sherman Act by price-fixing and suppression of competition should not at law or in equity be entertained as evidence that a true class does not exist. At law or equity, the existence of a preference for unlawful Union activity like price-fixing and suppression of competition is not and should not be cognizable to discredit the class of professional orchestra leaders or to divide it in any way. Leaders who benefit from unlawful Union activities should not be heard to deny the class simply because they have different unlawful interests, which should not be recognized precisely because they are unlawful interests.

The foregoing considerations also apply where the leader-employers merely acquiesce in the Union program of price-fixing suppression of competition, etc., whether the acquiescence was reluctant, willing or merely the result of opinionless idolence.

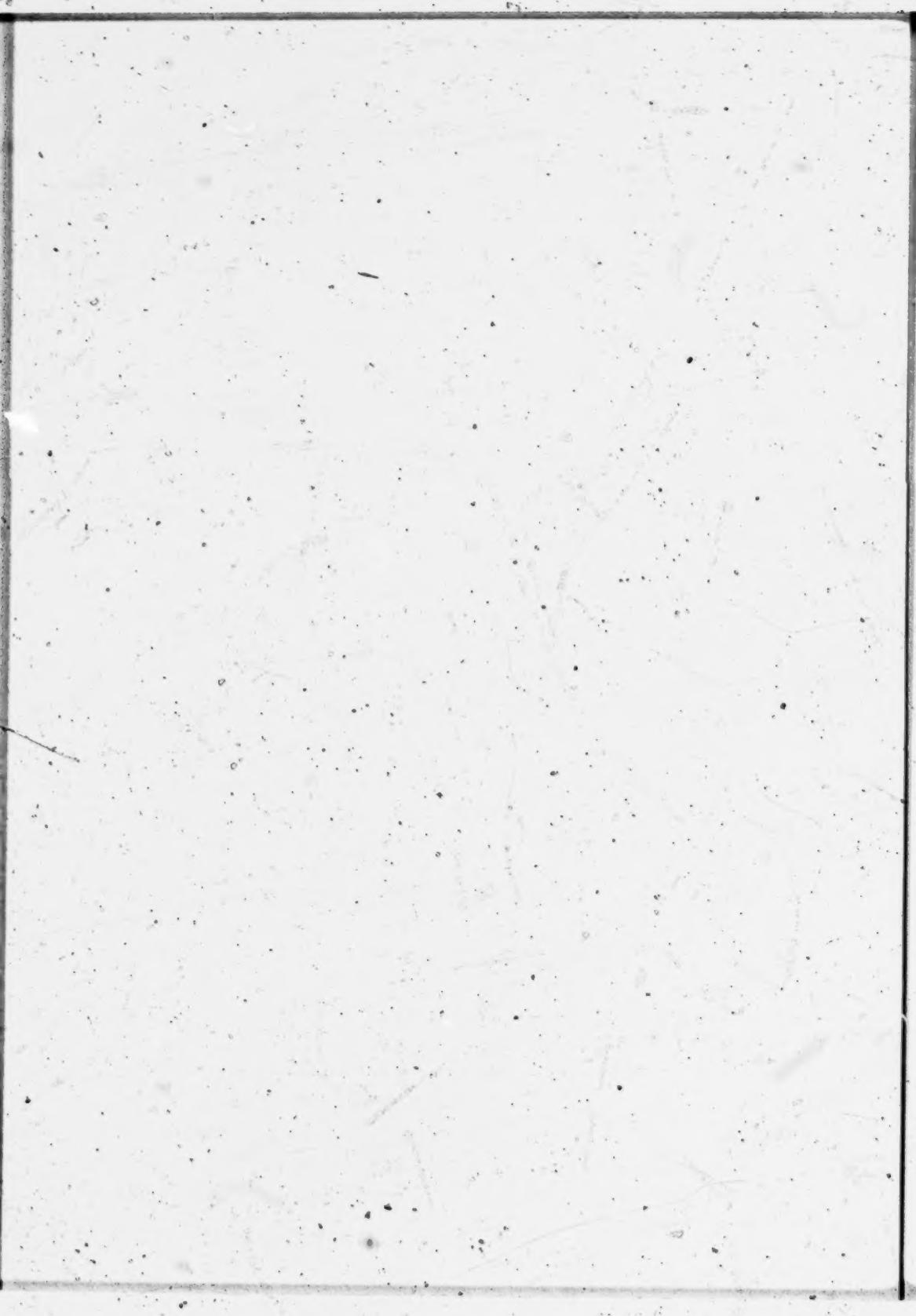
### CONCLUSION

**The judgment of the Court of Appeals (Second Circuit) insofar as it reverses the District Court on the issue of price-fixing should be affirmed; and it should be reversed or modified to grant to plaintiffs the further relief sought in their complaints and in this Brief.**

Respectfully submitted,

Dated: New York, N. Y., November 29, 1967.

GODFREY P. SCHMIDT,  
Attorney for Cross-Petitioners-Plaintiffs,  
100 West 42nd Street,  
New York, N. Y. 10036.  
Tel.: 212-279-0355





## SUPPLEMENT

The Trial Court's citations to support his finding of "competition" between leaders and sidemen are as follows:

(Tr. 2291) Q. Have you observed them performing as leaders? A. Some as leaders, yes.

Q. And others as instrumentalists? A. Yes, sir.

Q. Have you observed any members of the CBS staff orchestra performing services on steady engagements at nightclubs or hotels? A. Yes, I have seen them.

Q. To your knowledge, have they performed services as sidemen? A. As sidemen.

Q. Have you seen any perform services as leaders? A. Yes, sir.

(Tr. 2553) Q. Mr. Cutler, in your entire experience as an orchestra leader can you recall that you bid for the same job against a sideman?

Mr. Dannett: Objected to, your Honor. Against a leader I don't object.

The Court: Overruled. Against another bidder who was a sideman.

A. I wouldn't know who bid on the jobs.

Q. Did you ever find out after you had lost a job who got the job? A. Yes.

Q. Did you ever find out that you had lost a job to a man who was primarily a sideman? A. Yes.

Q. When did that happen? A. It happens all the time.

Q. Did you ever find that you were bidding against a sideman as to job and income for a particular assignment?

(Tr. 2554) Mr. Dannett: Objected to, your Honor.

The Court: Sustained.

Q. On those occasions that you say that you were bidding against a person who eventually got the job even though

he was a sideman, do you know what the price was that he charged and what the price was that you charged? A. Yes.

Q. Was there a difference?

Mr. Dannett: If he had knowledge.

The Court: Yes, if he has knowledge.

A. There was a difference on some occasions, and there was no difference on others.

(Tr. 2570) Q. Mr. Cutler, you have lost bids to other leaders, have you not? A. Yes.

Q. Were some of those leaders to whom you lost bids musicians who on other occasions act as sidemen? A. I doubt it. I have no knowledge of that.

Q. And this morning when you testified that there were such bids which you did lose to leaders who oftentimes played as sidemen you were incorrect in so testifying?

Mr. Schmidt: I object to the form of the question because that is not what he testified.

The Court: Sustained.

Q. You do not know of any bid which you ever lost to a musician who also *on other occasions* acts as a leader?

A. Not that I actually lost, no.

(Tr. 2571) Q. Do you know of any other leader who lost bids to musicians who on other occasions act as sidemen? A. I know that leaders do lose engagements to sidemen who may have a cousin or an uncle or someone, and they have an "in" on this particular job, maybe three or four a year, something like that. And in this respect leaders lose from the pool of engagements they may go after in the 802 jurisdiction. As a group, leaders do lose jobs to sidemen.

Q. And you do know that there are many musicians who are Local 802 members who on some occasions during the year act as sidemen and on other occasions act as leaders?

A. There are some. How many there are, I wouldn't know.

(Tr. 2395) Direct Examination by Mr. Schmidt:

Q. Mr. Sherry, what is your present occupation? A. Catering.

Q. Do you operate a catering establishment under your own name? A. Yes, sir.

Q. Is it operated under your own name personally or under a corporate form which includes your name? A. Under a corporate form which includes my name.

Q. What is the name of the corporation? A. Sid Sherry Caterers, Incorporated.

Q. Where do you maintain an establishment for catering? A. 550 Ocean Parkway, Brooklyn.

(Tr. 2396) Q. Is there a name displayed outside that establishment? A. Yes.

Q. What is the name? A. Ocean Parkway Jewish Center.

Q. Are you also a member of Local 802? A. Yes, sir.

Q. How long have you been a member of Local 802? A. Thirty-seven—forty years.

Q. Are you a musician? A. Not at the present time.

Q. You were? A. Yes, sir.

Q. What was your instrument? A. Trumpet.

Q. How long did you act as a musician?

The Court: Or until when?

A. Until eighteen or twenty years ago.

Q. And since then you have been in the catering business? A. Yes, sir.

(Tr. 2411) Cross Examination by Mr. Dannett:

Q. With respect to one hundred patrons that you said used your facilities last year, how many different orchestra leaders played in your establishment last year, if you can tell us? A. Numerous orchestra leaders.

Q. Among the orchestra leaders who played was there a Max Sontag? A. Yes.

Q. Do you know Mr. Sontag? A. Very well.

(Tr. 2412) Q. Is he a person who also, if you know, of your own knowledge, acts as a sideman? A. Yes.

Q. Do you know of your own knowledge whether he acts more frequently as a sideman than he does as a leader A. Yes, he does.

(Tr. 2422) Q. Sometimes customers give you a list of leaders and ask you to recommend one from the list? A. Yes.

Q. Can you remember some of the names on such a list? A. May I say this to you, that this is a very common occurrence. It happens very often.

The Court: Please try to answer his question.

The Witness: I can't answer it.

Q. You mean you can't remember the names of any? A. No.

Q. But you can remember, you say, that these leaders sometimes act as sidemen? A. Yes.

Q. Did you see them act as sidemen? A. Yes.

Q. What were some of the names of the people you saw act as sidemen on one occasion and leaders on the other? A. This sideman, this saxophone player, the (Tr: 2423) blond fellow, what's his name, Max Sontag, is a sideman and he has worked in my place as a leader.

Q. Can you think of any other? A. Yes, if you give me a minute. There is a man who works for Herb Sherry and he was a leader in my place, Gene Long. I think that's his professional name. There are others, too, but I can't at the moment think of them.

Q. I think you also testified that on occasion there were some leaders or sidemen, I don't remember which, who played in your place and who before or afterwards appeared on TV? A. Yes. There are numerous musicians, the musicians who do our business are very competent and they can play any part of the business.

Q. Can you name us any who did play on TV? A. Yes. There is a fellow by the name of Willie Farmer, he has done very fine work, he worked in my place. He has done the TV shot, some other kind of higher class business, too.

Q. Is he a leader? A. Sideman.

(Tr. 2427) Re-cross Examination by Mr. Dannett:

Q. Do you know Willie Farmer? A. Yes.

Q. Who is he? A. A drummer, he lives in Newark, New Jersey. I know him for many, many years. As a matter of fact, I once worked for Willie Farmer in the Hurricane, many years ago.

Q. Does he perform services as a sideman? A. He was my leader at that time.

Q. He also performed services as a leader? A. Yes.

Q. This was in the club-date single engagement field? A. The Hurricane was a night club.

Q. That was a steady engagement, was it? A. Yes. I also played for Willie Farmer many years ago in the Latin Quarter, as a relief leader he was there, and I was a trumpet player for him.

(Tr. 2427A) Q. Do you know Abe Pizik? A. Yes.

Q. Who is he? A. A drummer, an old-timer. A very fine drummer.

(Tr. 2428) Q. Does he perform services as a sideman in the club date single engagement field? A. Yes, he always has and he has played as a leader as well.

Q. And that is also in the club date single engagement field? A. Yes.

Q. Do you know whether he performs musical services in any other field? A. I believe that Abe Pizik has played every part of the music business that there is to play.

Q. Do you know Victor Goldring? A. Very well.

Q. Do you know what instrument he plays? A. Saxophone, clarinet, sings.

Q. Does he perform services as a sideman in the club date single engagement field? A. Yes, he does, but mainly he is a leader.

Q. When he acts as a leader is that in the club date single engagement field? A. Yes.

Q. Does he perform musical services in any other field, do you know? A. I wouldn't know.



(Tr. 2429) Q. Do you know Max Epstein? A. He is my former partner.

Q. Does he play an instrument? A. Yes, he is a saxophone and clarinet player and violinist.

Q. Does he perform services as a sideman in the club date single engagement field? A. Yes, he does.

Q. Does he also perform services as a leader in the club date field? A. He was my partner and we were leaders.

Q. Do you know Willy Epstein? A. Very well. That is his brother.

Q. And Julie Epstein? A. That is his brother, too.

Q. And do they all perform in the same manner as does Mr. Max Epstein? A. Yes, I believe they do.

Mr. Schmidt: I ask that that last answer be stricken out, I believe they do.

The Court: Yes, strike it.

Q. Do you know whether they perform services in the club date single engagement field? A. They do.

Q. Do they also perform services as both sidemen and as leaders in the club date single engagement field? A. Yes, they do.

Q. Do you know Milton Lehr? A. A piano player, yes.

Q. Does he perform club dates in the single engagement field? A. Yes, he does.

Q. Does he perform services on some occasions as leader and on some occasions as sideman? A. The only way I can answer that, because I don't know at the present time what he is doing, I will have to go back a little bit. May I?

Q. Yes, please. A. Milton Lehr was my leader in the theatre. He conducted the show in the theatre, and I played for him in a vaudeville theatre.

Q. Did he also on occasion act as a sideman in any other fields? A. I believe he acts as a sideman in the club date field.

Q. Do you know Mr. Molina, Boris Molina? A. Yes.

Q. Does he play an instrument? A. Trombone.

(Tr. 2874) Q. Do you play an instrument? A. Yes, I play the piano.

Q. Have you in the past performed services as a leader? A. I have.

Q. As a sideman? A. Yes, I have.

Q. And as a sub-leader? A. Yes.

(Tr. 2875) Q. In what field have you performed such services as a sideman? A. In the club date field mostly.

Q. In what field have you performed services as a sub-leader? A. What we call the steady field, hotels, night-clubs, theatres.

Q. In what fields have you performed services as a leader. A. In the steady field, nightclubs, hotels, theatres.

Q. Will you please name some of the places where you have performed services in the steady engagement field. A. Sheraton East Hotel in New York, St. Moritz Hotel, the Little Club, the Azores Hotel in Long Beach.

Q. In those places, did you act as a leader or sideman? A. Leader.

Q. Can you name some of the places in the steady engagement field where you have performed services as a sideman? A. Gaslight in New York, 56th Street, private club, I can't think offhand. Thé Latin Quarter in New York, The Copacabana.

(Tr. 2889) Q. You previously testified that you did perform services in the club date single engagement field. A. Yes.

Q. Did you perform such services as a sideman only or as a sideman and leader? A. Sideman and leader.

Q. About how many engagements a year have you as a leader in the club date single engagement field? A. Not very many; maybe about a dozen.

Q. About how many engagements a year have you as a sideman in the club date single engagement field? A. It is hard to say, it is pretty often when I am out of work, that I will be a sideman.

Q. When you say you are out of work you mean you are not employed steadily? A. Yes.

The Court: When you are not employed as an orchestra leader?

The Witness: That's right.

The Court: Then you say you take jobs as a sideman?

(Tr. 2890) The Witness: With anybody, yes.

Q. Just to clarify that, you take engagements as a sideman in the club date single engagement field when you are not working in a steady engagement? A. That's right.

Q. How long was your engagement at the Sheraton East Hotel? A. About six months.

Q. How many weeks did you work at the Little Club? A. Four weeks.

Q. How long did you work at the Azores Hotel? A. Twelve weeks.

Q. How many weeks did you work at the Latin Quarter? A. I worked at the Latin Quarter on and off for about four years. I was rehearsal pianist there also.

Q. How long was your engagement at the Gaslight? A. About six months.

(Tr. 2893) Q. On how many club date single engagements have you played in the last two years?

Mr. Schmidt: As a leader?

Q. In any capacity, leader or sideman? A. In the last two years I would say in the neighborhood of maybe 75.

Q. On those 75 occasions did the leader supply the musicians with sheet music? A. Not to my knowledge, no.

Q. On those 75 occasions were head arrangements used? A. Yes.

Q. Have you performed services in the club date single engagement field for a leader by the name of Sontag? A. I worked a job with him about two years ago.

Q. Have you performed services in the club date single engagement field for Mr. Carroll? A. Yes, I played a job for Mr. Carroll this spring at the St. Regis Hotel.

(Tr. 2894) Q. Mr. Carroll is the gentleman seated here in court? A. Yes.

Q. Have you performed services in the club date single engagement field for Mr. Cutler? A. No, I never have.

Q. Do you know whether there was any occasion on which you bid for an engagement in which Mr. Cutler also put in a bid for the same engagement? A. Yes, there are two specific instances.

Q. Where did these occur? A. I played up at Darien, Connecticut, at the Weeburn Country Club. He was up there the week before I was up there, and I think he put in a bid for the engagement I was on.

Mr. Schmidt: I object and move it be stricken, "I think he put in a bid."

The Court: Yes, strike it out.

Q. Do you know? A. Yes, he did.

The Court: How do you know?

The Witness: The party told it to me.

Mr. Schmidt: I ask it be stricken as hearsay.

(Tr. 2905) Q. On those occasions what was the range in the number of sidemen you used? A. Anywhere from four to twelve.

Q. Did you select those sidemen? A. Yes, I did.

Q. How did you select them, from the union exchange floor? A. Called them on the phone or saw them personally.

Q. You did not use the union exchange floor? A. Yes, if I would be up there and saw them up there I would engage them. Otherwise I would call them on the phone if I didn't see them up there.

(Tr. 2906) Q. Included in these people that you used in the club date field when you served 12 times a year, as a leader, were these 5 or 6 men you regularly use whenever possible? A. Whenever possible, yes.

Q. How far back does this average of 12 club dates per year as leader extend? A. A good many years, I would say. Some years maybe less.

Q. What's the least in any year that you have had in the last five years? A. I would say five.

Q. And the most was 12? A. Yes.

Q. How many times in the last five years did the band total 12 pieces? A. I'd say in the last five years maybe 15 times.

(Tr. 3088) Q. Mr. Stevens, are you a member of Local 802? A. Yes, sir.

Q. For how many years have you been a member? A. Approximately 15 or 16 years.

Q. Do you play an instrument? A. Yes, I do.

Q. What instrument? A. The trumpet.

Q. Do you perform services in the club date single engagement field? A. Yes, (Tr. 3039) I do.

Q. Do you perform services in that field as a leader? A. Yes.

leads, have you not? A. Yes.

Q. Have you performed services in that field as a sub-leader? A. Yes.

Q. Have you performed services in that field as a sideman? A. Yes.

Q. Approximately how many jobs have you had as a leader in the last five years? A. If I say approximately 35 to 40 I think I would probably adequately cover it.

The Court: Each year?

The Witness: Last year it was a little less. It is more this year than last. Maybe last year I would say 25. This year possibly up to 40, and we hope the following year more.



Q. Just taking the year 1963 how many jobs did you perform services on as a sub-leader in the club date single engagement field? A. I would say 40.

(Tr. 3040). Q. How many did you perform services on last year as a sideman? A. 50.

Q. You also performed services as a leader on steady engagement in the Catskill Mountains? A. Yes.

Q. Did you perform such services last year? A. Yes.

The Court: You mean in 1963?

Q. This summer, 1964, and the summer before, 1963.

A. Yes, sir.

Q. In connection with your engagements in the club date single engagement field do you on all occasions play the trumpet? A. Not on every occasion, sir.

Q. On what occasions do you not play the trumpet?

A. At times, if possible, when the piano player may not know some of the chords of a certain tune when a girl is singing, or there is a special request, I may sit at the piano and play it.

Q. So you may play either the trumpet or the piano?

A. Well, I also sing and that would come under the entertainment part.

(Tr. 3052) Q. Have you at any time bid for engagements which to your knowledge were also being bid for by Mr. Joseph Kaplan? A. Yes.

Q. On those occasions, to your knowledge, did you receive the engagement or did Mr. Kaplan? A. Well, there were instances where I remember specifically I did lose the date and another instance I got the date.

Q. Have there been occasions in which you bid for the same job that Mr. Benjamin Cutler was bidding for? A. Possibly. It is difficult to remember—

Mr. Schmidt: I ask that the answer be stricken.

The Court: Yes, strike it.

Mr. Dannett: May the witness finish his answer.

The Court: What is the question?

Mr. Dannett: The question is whether or not there were occasions when he was bidding for the same job.

The Court: Do you know?

The Witness: It is so difficult because we—

The Court: The question is do you know.

The Witness: Yes. There must have been.

(Tr. 3053) The Court: There were occasions?

The Witness: Yes.

Q. On that occasion, Was Mr. Cutler or yourself the successful bidder? A. I believe I was successful in that instance.

The Court: Was that one occasion?

The Witness: I remember this occasion because it was at the Americana Hotel. This I remember specifically.

The Court: When was it?

The Witness: I can't tell you exactly but I have in my brief case the exact date.

The Court: Can't you tell the year?

The Witness: Approximately a year ago.

Q. Have there been occasions in the past in which you were bidding for the same engagement that Mr. Peterson or Mr. Marty Levitt were bidding? A. I never came across Marty Levitt's name.

The Court: How about Peterson?

The Witness: I have come across his name.

The Court: When was that?

The Witness: Within a two-year period.

Q. Do you recall whether on those occasions Mr. Peterson or yourself was the person who received the engage-

ment? A. (Tr. 3054) Mr. Peterson received the engagement.

The Court: That was one engagement?

The Witness: I can't specify exactly. It is difficult to remember. The important thing I remember is the fact that I either got the job or lost the job. It is not too important who bid on the job against me.

The Court: On this occasion—

The Witness: I remember his name coming up in the conversation with the customer.

The Court: Who got the job?

The Witness: I think I lost the job. As I remember it I think I lost this particular job. It had to do with the Astor Hotel.

Mr. Schmidt: I ask that the answer be stricken.

The Court: Is that your best recollection or are you just guessing?

The Witness: That is my best recollection.

The Court: Let it stand.

(Tr. 3088) Q. You said that you bid against Mr. Cutler, Mr. Carroll and I think Mr. Peterson at one time or another? A. Yes.

Q. On those occasions, did you bid at prices below the minimum prices? A. Never.

Q. Did you bid at prices below the minimum prices fixed in the Local 802 price list? A. Never. They were wonderful competitors by the way because they would keep the price up.

Q. Did you at any time in your career in the last five years bid against any other orchestra leader at a price below the minimum price fixed in the Local 802 price list book? A. No. At this point, I came across sections where other band leaders would be bidding under scale which is quite prevalent in the Christian field. When I say "Christian field" I am denoting Christian weddings and

Christian affairs and there were many times when leaders would bid under scale.

Q. How would you know that? A. People would tell me. "You want \$200 for four pieces. I can get a band for \$100 for five pieces," and mention the name.

Q. In other words; the source of your knowledge is statements to you by these people who would say they could get a band at a certain price? A. That's right.

Q. You don't know whether they actually got the band at the price they named? A. I know of one specific instance where it happened just last week where I quoted the customer a price of \$150 for three pieces.

(Tr. 3293) Q. Do you know of any musicians who perform in the club date single engagement field who also perform services for the Metropolitan Opera House? A. This fellow Abe Marcus has worked for various leaders like Marty White, and has been a leader in his own right during the summer in one of the mountain hotels. He is a timpanist in the Metropolitan Opera.

Q. Do you know of any musician who performs in the club date single field who also performs for the City Center Ballet or the City Center Opera? A. They do, because we just got through negotiating a contract for them and their work, and they have told me, their work is only a 15-week season and the balance of the season they come on the floor and obtain club dates as strolling violinists and bass players, et cetera.

(Tr. 3653) Q. Do you recall stating in that affidavit, Mr. Arons, "There is fierce competition among the rank and file members in their efforts to obtain jobs as leaders because the wage scale for conducting is considerably higher than for playing an instrument." A. Yes.

Q. Is it true there is any competition whatever among the rank and file members to obtain jobs as leaders at prices below the minimum prices fixed in the price book of Local 802?

Mr. Dannett: We have conceded that, your Honor.  
The Court: Let him answer.

A. In what field are you talking. Club date field?

Q. The same field that you were talking about in this affidavit. A. Read it again, Mr. Schmidt.

Q. Here is the affidavit. A. That fact is correct.

Q. My question was whether as a matter of practice there is fierce competition or any competition? A. There is fierce competition.

Q. At prices below the minimum prices fixed in the Local 802 price list? (Tr. 3654) A. Not below.

The Court: Is that true in both steady and single engagements?

The Witness: In both steady and single.

Q. Do you recall in this same affidavit saying "Because every member of the union is free to accept a job as leader for a single engagement if he can get such a job, competition for the various jobs is assured." A. That's correct.

The Court: You say there was competition between leaders and sidemen to secure jobs as leaders?

The Witness: Every member in the club date field once he gets the contract, he is the leader.

The Court: Are you saying that sidemen as a practice submit bids to secure situations as leaders?

The Witness: Definitely, your Honor.

The Court: They submit bids for an orchestra to the single engagement purchasers?

The Witness: They certainly do.

Q. You mean by that that a man like Max Sontag submits regularly against a man like Tony Cabot? A. A man like Bob Kasha who submitted bids against Mr. Cutler was a sideman for Mr. Kahner, just the other day.

(Tr. 3666) Cross examination continued by Mr. Schmidt:

Q. Mr. Arons, you were giving testimony as to the exact number today of orchestra leaders in Local 802, do you recall that?



The Court: He did say perhaps, Mr. Jaffe would know more about this. Jaffe is going to testify.

Q. You recall yesterday I showed you Plaintiffs' Exhibit 341 for identification, your affidavit in the Cutler case?

A. Yes.

Q. Do you recall using this language in that affidavit "Moreover even full time leaders such as Cutler who constitute at most 2 per cent of all leaders in (Tr. 3667) the single engagement field compete for jobs with the remaining 98 per cent who are employees" do you recall saying that? A. I did.

Q. When you used the word— A. Let me answer this question, you mean Mr. Sontag competes with Mr. Cutler, in that sense?

Q. I am reading your sentence here. A. They all compete.

Q. That isn't my immediate interest. I want to know whether that 2 per cent is 2 per cent of the 6,000 or 8,000 figure that you just gave us? A. I think the 2 per cent, there was an exhibit in the other case.

Mr. Dannett: It is in this case, your Honor.

The Witness: In this case, the first part of this case, where out of all those 6,000, I figured 120 and and Mr. Ashe corrected me by counting and saying there were 82 full time leaders.

Q. In other words, this 2 per cent that you are referring to here in this affidavit concerns only orchestra leaders who are full time leaders? A. Who never act as sidemen.

(Tr. 3668) Q. The figure of six or eight thousand that you mention comprises in the vast number of instances persons who play in both areas, that is to say who play as leaders and as sidemen? A. Leaders and also sidemen.

Q. The competition you spoke of again is competition always at or above the minimum prices fixed? A. That's correct.

Q. By the local? A. Correct.

Q. Do you recall executing in the Cutler case this affidavit dated October 29, 1963? A. Right.

Q. Do you recall stating in that affidavit as follows: "As shown, the Form B contract was adopted in order to achieve a legitimate union objective of securing in all cases the maximum Social Security benefits for the leader. Furthermore, it is a legitimate union objective to require all leaders to use a single contract, whether those orchestra leaders function in the manner of Cutler or whether they perform in the manner described in paragraph 6 of this affidavit, or whether they perform services in the steady engagement field", do you recall that? A. Yes.

## INDEX

	Page
I. Plaintiffs' Brief Is a Hodgepodge of "Facts" Outside the Record and Contentions Not Litigated Below .....	1
II. Defendants Have Not "Combined" in Violation of the Antitrust Laws .....	7
A. Admitting Leaders Into Membership .....	7
B. The Regulations Affecting Leaders Do Not Constitute an Illegal Combination .....	10
C. Other Allegedly Illegal Forms of Combination .....	14
Conclusion .....	16

## CITATIONS

### CASES:

Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 .....	3, 7
Berenyi v. Immigration Director, 385 U.S. 630 .....	3
Graver Tank and Manufacturing Co. v. Linde Air Products Co., 336 U.S. 271 .....	3
Labor Board v. News Syndicate, 365 U.S. 695 .....	12
Meat Cutters v. Jewel Tea, 381 U.S. 676 .....	11, 13
Meat Drivers v. United States, 371 U.S. 94 .....	8, 10
Milk Wagon Drivers v. Lake Valley, 311 U.S. 91 .....	10
Mine Workers v. Pennington, 381 U.S. 657 .....	15
Mishkin v. New York, 383 U.S. 502 .....	4
Order of Telegraphers v. Chicago Northwestern Railway Co., 362 U.S. 330 .....	3
Sinclair Refining Co. v. Atkinson, 370 U.S. 195 .....	13
Teamsters Union v. Oliver, 358 U.S. 283 .....	11
Teamsters Union v. Yellow Transit Freight Lines, 370 U.S. 711 .....	14
United States v. Drum, 368 U.S. 370, 382 .....	11



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1967

---

No. 309

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED  
STATES AND CANADA, ET AL., *Petitioners*,

v.

JOSEPH CARROLL, ET AL., *Respondents*.

---

No. 310

JOSEPH CARROLL, ET AL., *Petitioners*,

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED  
STATES AND CANADA, ET AL., *Respondents*.

---

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

---

**REPLY BRIEF FOR THE  
AMERICAN FEDERATION OF MUSICIANS, ET AL.**

---

**I. PLAINTIFFS' BRIEF IS A HODGEPODGE OF "FACTS" OUT-  
SIDE THE RECORD AND CONTENTIONS NOT LITIGATED  
BELOW.**

By the time a case reaches this Court for adjudica-  
tion the process of litigation has normally eliminated  
all factual issues, and sharpened and confined the legal  
issues which this Court has agreed to hear. The briefs  
of the parties are therefore required to address them-  
selves to those legal issues and to avoid the introduc-



tion of extraneous matter which can only obstruct the deliberative process. Plaintiffs, however, expand, the areas of legitimate disagreement by either disputing or disregarding the factual findings below and by injecting into the case numerous allegations of illegal activity by defendants not litigated or passed upon below. We do not wish to compound the imposition on the Court by following plaintiffs into all these back-alleys of disputation. However, because of our prior experience in this litigation, where this technique has succeeded all too frequently in confusing matters, we feel obliged to demonstrate in summary fashion the manner in which plaintiffs misstate the record and argue matters not properly before the Court.

Plaintiffs continually invite this Court to find the facts for itself (See, *e.g.* pl. br. pp. 10-11, 12-14, 14-29, 32-33, 38, 43-44, 47, 69, 79, 84-86, 88, 90, 100-103) and include burdensome sets of string citations to the record (*id.* at 12-14, 43-44, 47, 79.) The Court is asked to establish the facts also from a book not in the record (*id.* pp. 14-29, 84-86), from facts found in other cases on other records (*id.* pp. 3, 48, 91) and by reliance on what "attorney for cross-petitioners has been unable to discover" (*id.* p. 90.) Plaintiffs expressly disagree with the District Court's findings (pl. br. 14, 14-15, 19, 43, 86, 100),<sup>1</sup> at one point contrary to their own stipulation

---

<sup>1</sup> For example plaintiffs say: "Indeed, the record is so conclusive on this subject, that one is left wondering how the Trial Court could, upon the basis of record evidence, have concluded that orchestra leaders and their sidemen, when making recordings, are the 'employees' of the recording company." (pl. br. p. 19) But the District Court cited copious "record evidence" to support these findings (Nos. 58-72 App. 136-138), and the Court of Appeals agreed. (App. 184-185). See also p. 2, n. 2 of our Brief in Opposition in No. 310.

before trial. (Compare pl. br. p. 43, with Finding No. 79, App. 142, based in part on Stipulated Fact 27, App. 107.) The District Court's findings were meticulously annotated to the transcript of a lengthy trial, the voluminous exhibits, the admissions and the stipulations; they were left undisturbed by the Court of Appeals. Plaintiffs do not even render passing obeisance to the settled rule that this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious or exceptional showing of error", e.g. *Graver Tank and Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275; *Berenyi v. Immigration Director*, 385 U.S. 630, 635, much less meet its requirements. Throughout their brief, plaintiffs make factual assertions, which are to put it most generously, unreliable,<sup>2</sup> and legal contentions which are quite remarkable.<sup>3</sup>

---

<sup>2</sup> While we do not wish to burden the Court with a lengthy argument concerning these often irrelevant factual assertions, we will compare for purposes of illustration a few of these assertions with the record evidence:

(1) plaintiff asserts that one Levitt acts as a sideman only . . . "two or three times a year and then only as an accommodation for a fellow orchestra leader who suddenly needed a replacement." (Pl. br. p. 74). Levitt testified that he worked

(Continued on page 4)

<sup>3</sup> Plaintiffs customarily dispose of inconvenient statutes or decisions by casually attacking and then ignoring them. Thus, the definition of a labor dispute in *Norris-LaGuardia* is dismissed as "quite irrationally inclusive", and plaintiffs argue that its literal breadth requires judicial limitation. Pl. br. p. 71. But compare *Order of Telegraphers v. Chicago Northwestern Railway Co.*, 362 U.S. 330, 335. With equal blandness, the brief-writer charges that this Court "mischaracterized" the facts in *Allen Bradley Co. v. Local 3*, 325 U.S. 797, Pl. br. p. 56.

Plaintiffs also raise a large number of claims of illegality which were not included in their complaints or the issues stated for trial in the pre-trial order and were not passed on by the courts below. While plaintiffs presented 27 questions in the Petition for Certiorari, there are a considerable number of contentions in the brief that were not raised in the Petition.<sup>4</sup> (See, e.g., pl. br. pp. 5, 12, 31, 49, 70, 91, 92, 93). At pages 94-99 plaintiffs list fifty-four separately-numbered union practices which they assert were encompassed by their "claim of union monopoly \*\*\* before the Courts below." (Pl. br. p. 94). One wonders how those Courts overlooked them.

---

as a sideman about 25 times in five years (TR. 577) and there was no testimony that he did so for any reason other than a desire to increase his income. (2) Plaintiffs erroneously stated that Carroll and Peterson were expelled, *inter alia*, for failing to charge the minimum prices promulgated by the union. (Pl. br. p. 50). The District Court found that they were expelled for other reasons, (Findings 4 and 5, App. 125-126) and as recently as their Opposition to the Petition for Certiorari (p. 9), Plaintiffs stated that Carroll and Peterson had been expelled as a reprisal for the institution of the instant suits. (3) Plaintiffs also habitually resort to the technique of the half-truth. Thus, they state that defendants never bargain collectively (Pl. br. p. 62) despite findings that there is bargaining in areas other than club dates (App. 153 *et seq.*). Their transcript reference (TR. 26) is to testimony that the AFM does not bargain on single engagements.

<sup>4</sup> We do not understand the Court's grant of *certiorari* on plaintiffs' Petition (No. 310) to have been intended as *carte blanche* to raise here matters not litigated below; we assume rather that the Court wished to take up the entire case, and was unwilling to undertake the burden to winnow the wheat from the chaff in plaintiff's petition. Of course the Court is not bound thereby to consider issues which a fuller examination shows not to be properly or clearly presented by the record. See, e.g. *Mishkin v. New York*, 383 U.S. 502.

We cannot believe that plaintiffs seriously contemplate that the Court will decide these newly raised issues. Rather, we must view this as a deliberate effort to paint the unions as malefactors in the hope that they will be treated accordingly.<sup>5</sup>

The final imposition upon this Court is plaintiffs' extensive reliance upon a book by one George Simon, published after the decisions below which deals with a segment of the music industry not involved in this case.<sup>6</sup> We see no need—since it characterizes itself—to

<sup>5</sup> Some of the assertions are not remotely related to the antitrust laws. At p. 12, plaintiffs argue that payments to the Steady Engagement Welfare Fund violate § 302 of the Taft-Hartley Act. Even if correct, this would have no place in this case. But it is not only incorrect, it is preposterous. The only payments prohibited by § 302 are those by "employers" to the representatives of "their employees". And plaintiffs incorrectly assume that leaders are employers on non-club dates although the Court below indicated to the contrary. (App. 184.)

<sup>6</sup> It merely compounds their imposition on this Court's processes that plaintiffs fail to point out that the book deals with "name bands" whose operations and economics are substantially different, who rarely if ever perform club dates, and to whom plaintiffs do not belong, as the District Court expressly found (App. 150). Having attempted and failed to assimilate themselves to name bands at trial, plaintiffs now resort to this book fortuitously published during the pendency of this appeal, to achieve the same result.

Solely for the convenience of the Court, we quote in full Simon's sole reference to Cutler (at p. 505), of which plaintiffs make so much:

"Ben Cutler, a good-looking Yale graduate who once made headlines when he drove his car into New York's East River, led one of the more musical society bands that featured a good accordionist, fiddler and a pianist with the unlikely name of Seymour Fiddle, plus a talented and pretty vocalist-pianist with the likely name of Virginia Hayes."

None of the other plaintiffs is mentioned as a leader in the book.



comment elaborately on the effort to use this book as a means of assaulting the fully supported and carefully documented findings below. This Court reviews judgments, not books.

The apparent purpose of plaintiffs' desperate effort is their desire to paint a picture of the club date field different than that accurately found by both courts below. The true picture was best summarized by Judge Friendly in his separate Opinion:

“\*\*\*Beginning with the single sideman leading himself, this ranges through the sideman who picks up two or three engagements a year as leader of a larger group, the performer who spends a fair portion of this time as leader, the musician who does nothing but lead, and exclusive leader having several bands with engagements at the same time, up to the few leaders who have ceased to lead at all. Obviously, this means a high degree of interchangeability in work functions and competition among Union members for posts as leaders.”  
(App. 204)

Judge Anderson, for the majority, described the field similarly, “[t]he same orchestra leaders who are ‘employers’ in the club date field are very often ‘employees’ when they perform as sidemen or sub-leaders or when in other fields the purchaser of the music is actually the employer.” (App. 202). And the District Court found:

“35. Such musicians who work as sidemen in club date or non-club date fields perform as leaders in the hotel steady and club date fields. They bid for the same jobs as full-time leaders such as plaintiffs and perform the same musical service when they get a job. They also perform in the same places as



full-time leaders (2291, 2553-54, 2571, 2395-96, 2411-12, 2422-23, 2427, 2428-30, 2874-75, 2889-90, 2894, 3038-40, 3052-54, 3088-89, 3293, 3653-54, 3666-68, Exs. 58 DE, pp. 188-89, HE; F.F. 29)."

Defendants fully concede the fact—universally recognized long before Mr. Simon's book—that some musicians (both leaders and sidemen) achieve great reputations because of their unique talents and personalities. But defendants have no less a right to regulate their minimum compensation for working as musicians than does the Screen Actors Guild to regulate the minimum wages of big-name movie stars or, for that matter, the right of the Carpenters Union to regulate the minimum wages of uniquely gifted carpenters. The plaintiffs cannot, by egregiously improper invocation of and reliance upon matters outside or in flat contradiction of the record evidence, or by any other means, escape the fundamental fact that performing leaders are "job threats" (App. 202) to subleaders and sidemen. See pp. 8-9 *infra*.

## II. DEFENDANTS HAVE NOT "COMBINED" IN VIOLATION OF THE ANTITRUST LAWS.

### A. Admitting Leaders into Membership.

Plaintiffs' major theory is that defendants subject themselves to the rule of *Allen-Bradley Co. v. Local 3, IBEW* by accepting them and other leaders who operate as they do into membership. Pl. br. p. 45. Such leaders, they assert, are a "non-labor group," and membership in the union is a "combination". In disputing the holding of the Court of Appeals that this case does not come within *Allen-Bradley*, they are especially critical of what they consider to be the Court's errone-

ous failure to recognize that their membership in defendant unions is a "combination". (Pl. br. p. 64).

Even if this argument is accepted in its entirety, it does not establish a combination *in violation of the antitrust laws.*<sup>7</sup> The fact that not every "combination" violates the antitrust laws does not require elaboration. *Meat Drivers v. United States*, 371 U.S. 94, held that the decisive economic reality in determining whether unions may lawfully admit particular persons into membership is *not* simply whether they are "self-employers or entrepreneurs," as plaintiffs would have it (Pl. br. p. 59, emphasis in original).<sup>8</sup> Rather, it is the existence of job and wage competition or other economic interrelationship between the union's members and such self-employed entrepreneurs. 371 U.S. at 103, see also *id.* at 98. Thus, if leaders are in job and wage competition with defendants' employee members, they do not, by joining in a union with them, participate in a "combination" forbidden by the antitrust laws.

The District Court found leaders such as plaintiffs to be in job and wage competition with subleaders (Findings 36-38, App. 131), and with sidemen (Findings 43-45, App. 132). The Court of Appeals agreed. (App. 199 and 202). Plaintiffs dispute its existence, but the Two-Court rule renders extensive examination

---

<sup>7</sup> Since both courts below held that leaders are employees in fields other than club dates, the union could admit them into membership without violating the antitrust laws for that reason alone. (App. 168, 202).

<sup>8</sup> This is in contrast to plaintiffs' earlier position, which correctly understood the concluding paragraph of *Meat Drivers* but sought to escape its authority by characterizing it as "diffuse" and "unrealistic" *dictum* (Pet. for cert. No. 310, pp. 20, 30):

of their assertions unnecessary.<sup>9</sup> It is enough to observe that these findings, which both courts considered central to their holdings, are amply supported by the record, *e.g.*, TR., 524, 842-843, 1353, 3657.<sup>10</sup>

---

<sup>9</sup> At one point their tortuous argumentation actually leads plaintiffs to the following:

"When an orchestra leader employs a subleader, He multiplies work opportunities for such employee-musicians. If the leader performs an engagement (because the client insists on the leader's presence), the leader does not *displace*, as the court below held, a subleader. He merely *does not hire one*." (Pl. br. p. 9, emphasis in original)

The musician who does not get the job will fail to appreciate the distinction. Plaintiffs do not explain its legal significance—it obviously has none. Workers have as much right to combine to obtain employment as to preserve it. The distinction is particularly empty where, as is true of the club date field, fixed employment is almost nonexistent.

We have used this example purely for illustrative purposes, but we do not thereby concede its factual accuracy. This case must, of course, be decided on its merits, and the quoted passage, though consistent with the ultimate conclusion which we urge, is based on plaintiffs' own version of the facts, which are not to be discovered in the record or the findings.

<sup>10</sup> Thus, plaintiffs' witness Sherry, an orchestra leader who plays the accordion, testified (TR. 1313-14):

"Q. In the instance where you had a sub-leader, would there be occasions where in that case you would be required to furnish an accordion player? A. Yes."

"Q. In such a case since you could not personally appear there did you hire another accordion player to replace yourself? A. Yes."

Again, plaintiffs' witness Flatte, an orchestra leader who plays the drums, testified with respect to engagements at which a drummer was called for but at which he could not personally appear and play the drums (TR. 1376):

"Q. And in such a case would you engage the services of a drummer? A. Yes, I would engage the services of a drummer if a drummer was called for on the job."

**B. The Regulations Affecting Leaders Do Not Constitute an Illegal Combination.**

We have shown that defendants do not create an illegal combination by admitting leaders into the union. While membership itself is plaintiffs' main target,<sup>11</sup> they also challenge the particular regulations governing leaders. But just as the existence of job and wage competition means that the union may admit leaders into membership, so the existence of such job and wage competition furnishes the predicate for lawful union regulation of all musicians, including leaders. The union must be permitted to achieve those objectives which justified bringing the persons involved into the union. *Meat Drivers* did not contemplate a sterile privilege; the court in *Meat Drivers* relied upon earlier decisions, most notably *Milk Wagon Drivers v. Lake Valley*, 311 U.S. 91, which had upheld union attempts to regulate independent contractors and derived from those cases the test it applied to determining permissible membership. (See Brief of AFM, pp. 45-47.) In terms of this case, this means that defendants must be permitted to adopt regulations which protect the labor standards of employee musicians. In our opening brief we demonstrated that this was the purpose and the effect of each of the regulations challenged herein and passed on below. Because plaintiffs treat only sporadically and cryptically with such, our discussion of the individual regulations can be brief.

Plaintiffs' approach to the legality of the regulations fixing the minimum compensation of the leader is to call them "price-fixing". But this is not an adequate

---

<sup>11</sup> NAOL states batly, "If orchestra leaders are businessmen, they should not be union members." (NAOL br. p. 37).



substitute for examination of the economic realities, even if the word "price" is printed in italics (Pl. br. pp. 41, 42, 50, 51, 56, 70, 80, 82, 83), or preceded by the adjectives "naked" and "stark" (Pl. br. pp. 41, 43).<sup>12</sup> We have shown in our main brief that the "crucial determinant is not the "form" but the reality of the union's efforts and we need not, therefore, dwell on the plaintiffs' addiction to unhelpful verbal labels.

With respect to the closed shop, minimum quotas, and traveling regulations; plaintiffs make the common argument that they may not lawfully be applied to employers. But the union has as much right—for purposes of the antitrust laws—to protect the job opportunities of employee musicians from non-union or foreign leaders as from leaders who undercut employee scales. As the Court of Appeals held, the fact that the leaders are "job threats" to employee members renders the unions' attempt to obtain a closed shop a "legitimate union concern." (App. 202.) The argument that the minimum quotas are unlawful because they include the leader (Pl. br. pp. 80-81, 93-24), is simply meaningless. Since obviously there will be someone performing the functions of leader on every musical engage-

---

<sup>12</sup> Nor is "profit," to which NAOL is partial, any more useful. (NAOL br. pp. 8, 18, 31). NAOL would distinguish *Teamsters Union v. Oliver*, 358 U.S. 283, on the basis that the union there "did not attempt to negotiate a profit for the owner-driver" (NAOL br. p. 31). But the union requirement here that the leader receive a minimum return for his performance is no more the negotiation of a "profit" than the requirement in *Oliver* that the owner-operator receive the union wage plus a fair rental. See the discussion of *Oliver* in *Jewel Tea* quoted at p. 38 of our main brief. NAOL is further in error when it says that in *Oliver* the owner-driver "had actually assumed an employee status." *United States v. Drum*, 368 U.S. 370, 382, n. 26, quoted at p. 38, n. 13 of our main brief.



ment, the result is the same whether the quota is calculated in terms of the number of sidemen (as plaintiffs insist), or in terms of the total number of musicians on the engagement (that is, the sidemen plus the musician performing the leader function.)

Our main brief anticipates everything that plaintiffs have said with regard to the regulation requiring the use of the Form B Contract, except the charge that it "explicitly incorporates, by reference, all AFM and Local bylaws (including those which offend antitrust laws)". (Pl. br. p. 83). The reason we did not anticipate this contention is because like many other contentions in plaintiff's brief it was outside the complaint and not litigated below.<sup>13</sup> Plaintiffs do not even now specify which are the offending bylaws, but apparently wish this Court to undertake a general examination of the bylaws. The effort need not be made because plaintiffs misstate the facts. The contract incorporates those bylaws only "to the extent permitted by applicable law" (App. 19, last paragraph before bold type). See *Labor Board v. News Syndicate*, 365 U.S. 695.

Plaintiffs say nothing which detracts from the demonstration in our main brief that the regulations of booking agents and caterers are necessary to preserve union standards. See Brief of AFM, pp. 67-70. Accordingly, no reply is called for here.

Plaintiffs object generally to all the foregoing regulations on the ground that they are not the product

---

<sup>13</sup> As the Court of Appeals found, the complaint does not allege that any specific provisions in the Form B are in restraint of trade. (App. 201.)

of collective bargaining between the union on the one hand, and leaders on the other. They argue:

*Jewel Tea* was the product of collective bargaining, which defendant Unions here have always spurned and eschewed. How, then, can the policy considerations be the "same" for the purposes of appraising, against "labor dispute" criteria, the defendants' bylaws and activities? How can *dictatorial imposition* of "terms and conditions of employment" be equated to elaboration thereof by *collective bargaining*? (Pl. br. pp. 75-76, emphasis in original).

This argument was disposed of in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195. It was there urged that a strike in breach of a collective bargaining agreement is not a "labor dispute" because Section 2 "contains language indicating that one primary concern of Congress was to insure workers the right 'to exercise actual liberty of contract' and to protect 'concerted activities for the purpose of collective bargaining.'" (*Id.* at 201).

This Court held to the contrary:

"In the first place, even the general policy declarations of § 2 of the Norris-LaGuardia Act, which are the foundation of this whole argument, do not support the conclusion urged. That section does not purport to limit the Act to the protection of collective bargaining but, instead, expressly recognizes the need of the anti-injunction provisions to insure the right of workers to engage in 'concerted activities for the purpose of collective bargaining or other mutual aid or protection.' Moreover, the language of the specific provisions of the Act is so broad and inclusive that it leaves not the slightest opening for reading in any excep-

tions beyond those clearly written into it by Congress itself.

We cannot ignore the plain import of a congressional enactment, particularly one which, as we have repeatedly said, was deliberately drafted in the broadest of terms in order to avoid the danger that it would be narrowed by judicial construction." (*Id.* at 202-203, emphasis in original).<sup>14</sup>

Plaintiffs say also:

"Nor are the travel restrictions here, except by self-interested union nominalism, properly designated by defendant Unions as 'terms or conditions of employment.' Real 'terms or conditions' must be bargained, or at least there must be a good-faith attempt to bargain them by the Unions, if there is to be exemption from the Sherman Act because of the Norris-LaGuardia Act." (Pl. br. pp. 79-80).

We had always supposed that even workers in unorganized plants have "real" terms and conditions of employment.

### C. Other Allegedly Illegal Forms of Combination.

Plaintiffs also assert that defendant unions unlawfully combine with hotels, restaurants, phonograph recording companies, broadcasters and other purchasers of music. (Pl. br. pp. 12, 60, 88-89). Their theory is that the unions enter into collective bargaining agreements with these enterprises which cover leaders, and

---

<sup>14</sup> We note that the dissenting justices did not deny that there was a labor dispute but held on other grounds that certain strikes in breach of contract were nonetheless subject to injunction. (*Id.* at 215-229). See also *Teamsters Union v. Yellow Transit Freight Lines*, 370 U.S. 711 (concurring opinion), where these justices voted to reverse an injunction against a strike in breach of contract.

that this is somehow prohibited by *Mine Workers v. Pennington*, 381 U.S. 657.<sup>15</sup> But this strange theory ignores the findings below that leaders are employees in those fields in which the union has collective agreements (App. 184-185) and is a drastic distortion of the *Pennington* opinion. That opinion treated with an agreement between a union and one set of employers having the objective of imposing wage standards on the latter's competitors in order to drive those competitors out of the industry. Here there is simply no competition between the leaders and the recording companies, et al., much less an attempt to drive anyone out of any given industry. Put otherwise, we are here dealing with an agreement covering one group of workers in one bargaining unit. Plaintiffs' effort to bring themselves within the language of *Pennington* by the assertion that "none of the alleged collective bargaining agreements defines a *bargaining unit*," (Pl. br. p. 12, emphasis in original) is, of course, an absurdity.<sup>16</sup>

As to the plaintiffs' argument regarding caterers, the short answer is that there is no combination, by agreement or in any other form, see Findings 120-122, App. 151-153, nor have plaintiffs here argued that the regulations themselves are invalid. While the defendant

<sup>15</sup> No such theory was raised in the complaint, litigated at trial or passed upon in the District Court. It made its first appearance in the brief to the Court of Appeals which rightly declined to consider it. In short, like many of plaintiffs' other theories of liability, it is as untimely as it is unmeritorious.

<sup>16</sup> The unions' collective bargaining agreements of course define the bargaining units. See, e.g., Ex. #FG 1, pp. 1-2, 5. The District Court found that the AFM has been certified by the Labor Board as the collective bargaining agent for all musicians, including orchestra leaders who perform services for recording companies. (Finding 60; App. 136).

AFM licenses booking agents, and requires them to agree to preserve certain conditions, this does not constitute a "combination" in violation of the antitrust laws, as Judge Levet held (App. 173-175). See also pp. 67-69 of our opening brief. Plaintiffs do not address themselves to Judge Levet's reasoning, contenting themselves with repeated conclusionary statements that combination with booking agents is unlawful. These do not call for reply.

### CONCLUSION

For the reasons stated herein and in our main brief, the holding of the Court of Appeals challenged in No. 309 should be reversed but the remainder of its judgment should be affirmed.

Respectfully submitted,

HENRY KAISER

EUGENE GRESSMAN

GEORGE KAUFMANN

RONALD ROSENBERG

1730 K Street, N.W.

Washington, D.C.

*Attorneys for Petitioners*

*Of Counsel:*

EMANUEL DANNETT

JEROME H. ADLER

DAVID I. ASHE







**LIBRARY**

**FILED**

**SUPREME COURT, U. S.**

**JAN 10 1968**

IN THE

**Supreme Court of the United States** CHIEF CLERK

**OCTOBER TERM, 1967**

**No. 309**

**AMERICAN FEDERATION OF MUSICIANS OF THE  
UNITED STATES AND CANADA, *et al.*;**

**Petitioners,**

*vs.*

**JOSEPH CARROLL, *et al.*,**

**Respondents.**

**No. 310**

**JOSEPH CARROLL, *et al.*,**

**Petitioners,**

*vs.*

**AMERICAN FEDERATION OF MUSICIANS OF THE  
UNITED STATES AND CANADA, *et al.*,**

**Respondents.**

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT**

**CROSS-PETITIONERS (PLAINTIFFS') REPLY BRIEF**

**GODFREY P. SCHMIDT,**  
**Attorney for Cross-Petitioners-Plaintiffs,**  
**100 West 42nd Street,**  
**New York, N. Y. 10036.**

**Tel.: 212-279-0355**



## TABLE OF CONTENTS

---

	PAGE
Counterstatement of Certain Facts .....	1
Counterargument .....	7-37
1. Alleged "Job and Wage Competition" .....	7
2. The Alleged Evidence of Wage Cutting .....	13
3. The Alleged Threat Posed by "Working Employers" .....	14
4. The Alleged Evidence of Displacement .....	16
5. The <i>Oliver</i> Case Distinguished .....	25
6. The <i>Senn</i> Case Distinguished .....	32
Conclusion .....	37

### TABLE OF CASES

<i>Carroll v. Associated Musicians</i> , 310 F. 2d 925 (CA 2, 1962) .....	2
<i>Carroll v. Associated Musicians</i> , 51 LRRM 2310 (U.S.D.C. S.D.N.Y. N. Y., 1962) .....	2
<i>Hughes v. Kansas City Motion Picture, etc. Operators</i> , 282 Mo. 304 (1920) .....	33
<i>Local 24, I. B. T. v. Oliver</i> , 358 U. S. 283 (1959) ....	25
<i>Parke Paint &amp; Wallpaper Co. v. Local Union</i> , 87 W. Va. 631 (1921) .....	33
<i>Roraback v. Motion Picture Operators Union</i> , 140 Minn. 481 (1918) .....	33
<i>Senn v. Tile Layers' Union</i> , 301 U. S. 465 (1937) ....	32
<i>Truax v. Corrigan</i> , 257 U. S. 312 (1921) .....	33
<i>Truax v. Raich</i> , 239 U. S. 33 (1915) .....	33

### STATUTE

National Labor Relations Act, § 8(b)(4)(A) .....	36
--	----





IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1967

---

No. 309

AMERICAN FEDERATION OF MUSICIANS OF THE  
UNITED STATES AND CANADA, *et al.*,  
Petitioners,

*vs.*

JOSEPH CARROLL, *et al.*,  
Respondents.

---

No. 310

JOSEPH CARROLL, *et al.*,  
Petitioners,

*vs.*

AMERICAN FEDERATION OF MUSICIANS OF THE  
UNITED STATES AND CANADA, *et al.*,  
Respondents.

---

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

---

**CROSS-PETITIONERS (PLAINTIFFS') REPLY BRIEF**

---

**Counterstatement of Certain Facts**

A. Defendant Union's brief in a number of places (pp. 17, 41, 43, 59, 65) irresponsibly uses<sup>1</sup> words like "undis-

---

<sup>1</sup> *E.g.*, "The District Court had properly rested its legal conclusions on *uncontroverted* detailed evidentiary findings of job and wage competition between the leader and employee musicians. The Court of Appeals, though accepting these *uncontested* findings, wholly misconceived their legal consequences. \* \* \*" (p. 41; emphasis added)

"Given these findings, based on *uncontradicted* evidence, enforcement of a minimum price \* \* \* when the leader does not perform, operates *in fact*, to prevent him from competing with other leaders by reducing employee wage standards." (p. 59; emphasis added)

puted", "uncontradicted", "uncontroverted", "uncontested", to refer to statements which plaintiffs have always vigorously challenged and which are in fact supported by no substantial evidence in the record.

Not only were involved findings by the District Court controverted and contradicted; they have no basis in any probative evidence. As often as defendant Union's prate of these District Court findings, *they never cite pages of the record which allegedly support them.*

The Supplement to Cross-Petitioner's main brief, as well as Point IV thereof, show very plainly that the District Court's findings on "job and wage competition" are without support in the record.

B. Likewise, the Union briefs in these cases erroneously or falsely disclaim the patent existence of Union *combination* with non-labor groups. See Cross-Petition, pp. 18-19; Brief in Support of Cross-Petition, pp. 11-14, Point II; and Cross-Petitioners' main brief, pp. 42-43; 46-50.

C. Upon the basis of an agreement made by AFM attorneys and plaintiffs' attorney (as reflected in Judge Friendly's decision in *Carroll v. Associated Musicians*, 310 F. 2d 325), Local 802 permitted Carroll and Peterson to use Union musicians, *provided they did not practice their profession by personally leading their orchestras.* See AFM brief, pp. 10-11. The Trial Court unrealistically and without evidence [and in complete contradiction of its own earlier findings in *Carroll v. Associated Musicians*, 51 LRRM 2310<sup>2</sup> (1962) at pp. 2312-14 (§ 2), "As to Plaintiff Carroll" (§ 3), "As to Plaintiff Peterson" and the portion entitled "Defenses"] and in contradiction of common sense found that in so operating the "Union does not significantly hinder them from carrying on their business in

---

<sup>2</sup> The LRRM indices *erroneously* give to this case the following citation: 206 F. Supp. 462.

this fashion", and, insofar as "they do not themselves conduct or play, the charge of pressuring them into the Union has not been sustained" (App. 168). This grossly unsupported finding, neglected (i) the obvious fact that Carroll and Peterson were being held out by the Unions as horrendous examples of what would happen to an orchestra leader who was expelled from Union membership; and (ii) the fact that Carroll and Peterson were prevented from acting as orchestra leaders in the manner characteristic and required of orchestra leaders. This necessarily entailed irreparable damage, as well as money damage. Neither of these consequences affect leaders who are AFM members.

"The Court: Normally you would have led your orchestra, is that so?

The Witness: Yes, sir.

The Court: And you had some additional expense by reason of the employment of somebody to lead the orchestra?

The Witness: Because of the—

The Court: Well, you had it?

The Witness: Yes, sir.

The Court: And you were unable to lead the orchestra because of certain acts or pronouncements of the Union, is that so?

The Witness: Yes, sir.

. . . .

Mr. Dannett: And he also on those occasions would have acted as drummer at least on some or all.

The Witness: Not all of them.

The Court: You would have in some of the instances?

The Witness: Depending on the size of the orchestra, your Honor." (Tr. 1778-79)

"The Court: Did you pay additional monies to these leaders who took over for you?

The Witness: Yes sir. Both for a leader to take over and for a musician.

The Court: A drummer?

The Witness: A drummer to make up a minimum of six or a drummer to make up a minimum of five or twelve actual playing musicians in the grand ball-room of the hotel not including me. Having contracted for twelve pieces, I wound up providing thirteen if you figure me as still being in existence. Having contracted for six pieces I wound up providing seven." (Tr. 1779)

In spite of Kenin's testimony that the Union *insists* that all orchestra leaders become Union members (Tr. 164-165), and in spite of the penalties imposed upon Carroll and Peterson precisely and only *because they were expelled from Union membership* (in part for not demanding from their purchasers the minimum *prices* fixed by the Union), the Trial Court found that coercion into Union membership was not established!

The Courts below, nevertheless, uniformly refused to grant injunctive relief, despite the fact that the purpose of the injunction was to prevent defendant Unions from punishing Carroll and Peterson for having instituted the instant actions. See *Carroll v. Associated Musicians*, 51 LRRM 2310, reversed on other grounds, *which later became moot*, upon the basis of Judge Friendly's decision for the unanimous bench in 310 F. 2d 325.

In any event, the unique arrangements to which the Trial Court refers (App. 168) and to which the AFM Brief refers (pp. 10-11) under the heading "The Alleged Pressuring of Orchestra Leaders into the Unions" was

---

<sup>3</sup> It is to be emphasized that the only reason why Carroll and Peterson refused to demand the Union minimum *price* from their customers was because the instant actions had recently been commenced; and plaintiffs did not want to act in a manner inconsistent with their complaints herein.



*merely a temporary settlement pending final determination of this litigation, as expressly appears from Judge Friendly's Opinion. (Last paragraph of 310 F. 2d 325 (1962) at 327.)*

The Trial Court and Unions seem to think that this is and was the *permanent* predicament of Carroll and Peterson. The Trial Court first refers to the *temporary settlement* and then uses the *transient, atypical condition* it created to "*prove*" that Carroll and Peterson were not pressured into the Union! Compare the Trial Court's original decision respecting Carroll and Peterson with the later Memorandum of Judge Friendly (310 F. 2d 325), by which, for reasons now moot, Judge Levet was reversed in granting an injunction in favor of said plaintiffs in 51 LRRM 2310.

D. In several places (*e.g.*, p. 29), the AFM Brief misrepresents the Second Circuit's ruling respecting AFM *price-fixing*. The Court below had concluded "that the Unions' establishment of price floors on *orchestral engagements* is not a subject of such direct and overriding interest to unions \* \* \* that it is a mandatory subject of collective bargaining \* \* \*" (App. 197; emphasis added). This language the AFM Brief twists as follows, equating "orchestral engagements" with "club date engagements":

"But the Court of Appeals for the Second Circuit, while reaffirming the findings of job and wage competition, invalidated those regulations establishing the minimum compensation of the leaders on *club date engagements*."

The ruling of the Second Circuit was *not* confined to "club date engagements"; it was a ruling on prices of "orchestral engagements." Likewise, it was not just a ruling on "the minimum compensation of the leaders"; it was a ruling on the "*price* of orchestral engagements."

The complaints here do not even mention the "club date field."

E. Defendant Unions, in their main Brief (p. 27) dogmatize: " \* \* \* Because of the singular nature of employment relationships in this field, there is a direct, rather than an indirect, relation between the price received and the wage paid to the employees". *Ipsi dixerunt*. The real employment relationship in this field is not singular" in the sense of being *unique*. For example, in the catering industry, the caterer has a core of waiters and waitresses on whom he regularly calls. When he needs more than these he hires extras, either through the union or through an employment agency. The same is true of painting contractors, building contractors and others.

F. The AFM main Brief (p. 5) again grossly caricatures what happens when a client engages an orchestra leader. This travesty on the real picture was criticized by plaintiffs in their "cross-petitioners' brief in opposition to petition for writ of certiorari" at pages 4-5. It completely neglects the *normal*, expensive telephone solicitations made by professional leaders (Tr. 1688). If leaders are as indistinguishable from sidemen as the Union Brief tries to make them, there could be no *professional* leaders. It is nothing short of shocking misrepresentation to affirm, as do the Unions: "Normally, the purchaser of the music \* \* \* approaches a musician \* \* \* [who] \* \* \* thereby becomes the 'leader' \* \* \*" (p. 5). As the Union statistics demonstrate (Defendants' Exhibits K, L and M, App. 398b-400b), the *normal* procedure is for clients to go to an *established professional leader*<sup>4</sup> (one of a group doing the vast majority of engagement contracts), not to a sideman who "becomes" a leader *ad hoc*!

---

<sup>4</sup> This term, includes a person like orchestra leader Flatte (Tr. 1358-93) who by day works as a salesman in textiles, but of evenings is an orchestra leader, never a sideman; and who has an established business as leader. It also includes the leaders of "the big bands" and the "name bands", no matter now defined, as well as of many orchestras having unknown or relatively unknown names.

## Counterargument

### 1. Alleged "Job and Wage Competition".

A. The AFM brief pins everything on the so-called "job and wage competition between leaders and employee musicians", which it regards as the "crucial determinant" (p. 31). Thus, because of alleged "job and wage competition": (i) Union regulation of the "performing leader's" income is "lawful" (pp. 43, 51); (ii) There is no *combination* between the Unions and any non-labor group (47).

The index to the AFM brief contains no reference whatever to the nationwide systems of *price-fixing* and "*price-lists*", which have characterized AFM regimentation of the musical industry for more than 60 years. The keystone position of the incantation, "job and wage competition" (which the AFM Brief never analyzes or separates into actual or conceivable categories based on record evidence), is luminously revealed in the AFM argument and argument headings. The trouble with the argument is that the alleged "job and wage competition" between leaders and employee musicians is a myth or fiction for which no evidence in the record is or can be provided. See cross-petitioners' main Brief, Point IV and Supplement; cross-petitioners' Brief in support of the cross-petition, pages 15-19; and the cross-petition, pages 26-33.

The defendant Unions' Brief invokes the rubric: "job and wage completion", more than 43 times.<sup>5</sup>

---

<sup>5</sup> The AFM Brief seeks to justify conduct of which plaintiffs complain by the mere formula "job and wage competition" on 12 pages (pp. 29, 30, 32, 35, 37, 41, 43, 44, 45, 47, 48 and 51). In thus repeating the quoted phrase, its meaning is left by defendant Unions for speculation. Who are the competing parties is not consistently indicated or is not specified at all in the pages just cited; nor are the meanings of the words "job" and "wage" specified. (See Cross-

Competition among professional orchestra-leader-employers for orchestra leader's work is simply none of the business of a trade union. Unions which regulate such employer-entrepreneurs' competition should *not* be protected. Unions cannot possibly engage in regulation of such competition without combining with non-labor groups. It is significant that, despite its conjury, more than 43 times, with "job and wage competition", the Union Brief at no time cites any specific, actual instances of such "competition" *from the record*. The reason is clear. *There is no record evidence of any such competition*. The Unions simply rely upon the Trial Court's unsupported finding, allegedly predicated upon the pages of testimony gathered in the Supplement to the Cross-petitioners' Brief on the merits. That Supplement shows no testimony of actual "job and wage competition" and *names no competitors*. There is only testimony that, on occasion, some (usually unidentified) people, *sometimes work as sidemen and at other times work as "orchestra leaders"*. E.g., the Unions' main Brief (p. 9): "• • • 50% of plaintiff Levitt's sidemen acted as orchestra leaders during 1960-64." How often?

(Footnote continued from preceding page)

petition for Certiorari, pp. 26-31.) However, in other places, one or both of the competing parties are described. For example, defendant Unions speak of the *job and wage competition* "of working employers" (pp. 26, 28), "of the leaders" (pp. 25, 43), "by the leaders" (p. 22), "from working employers" (pp. 23, 43, 57), "by working employers" (pp. 29, 30, 32), "from the employer himself" (pp. 55, 56) and "of the employer himself" (p. 57). At other times the defendant Unions speak of job and wage competition "with employee musicians" (pp. 25, 27, 29, 31, 61), "with employees" (p. 41), "with its employee members" (p. 61). In two places the Union brief speaks of *job and wage competition* "with the union members", without specifying whether those members are *employee* members or *employer* members (pp. 34, 49). On five pages, the *job and wage competition* is "between leaders and employee musicians" (pp. 31, 40, 41, 46) or "between leaders and sidemen and subleaders" (p. 32). The *job and wage competition* is "with each other" (p. 31), "among leaders" (p. 53) and "by his alter ego" (p. 55).



Where? For whom? At what prices? In what market? No testimony answers these or similar questions.

Such "competition" is alleged to be for *jobs* and *wages* between *leaders* on the one hand and *employee musicians* (sidemen and subleaders) on the other hand. This necessarily means that *leaders* and *employee-musicians* both strive for one, some or all of the following *alternatives*: (i) *jobs as leaders*; (ii) *jobs as subleaders*; (iii) *jobs as sidemen*; (iv) *musical engagement contracts*; (v) *income of leaders*; (vi) *wages of subleaders*; or (vii) *wages of sidemen*. There are no other possible alternatives.

Plaintiffs as orchestra-leader-employers and businessmen, derive their livelihoods from the profits they realize from practice of their profession. This they can do only because they have developed their businesses to the point where they have enough clients and profits to support themselves and their families. It should be obvious to common sense, therefore, that such orchestra-leader-entrepreneurs have better things to do with their time than to compete for *jobs as employee-musicians* with subleaders and/or sidemen. Likewise, it should be evident that established leader-entrepreneurs do not compete for *wages* with sidemen or subleaders. They spend their time much more profitably by working as *leaders* than by working as employee musicians. They would only obstruct their own success as *leaders* by seeking *wages* as sidemen or subleaders. These considerations eliminate *alternatives* (ii), (iii), (vi) and (vii) above. They are alternatives without support in the record; simple reasoning about the business and profession of orchestra-leader-employers refutes them. Not one piece of evidence in the record shows that any of the plaintiffs, or any other regular orchestra leaders, ever competed for the *jobs* or *wages of sidemen or subleaders*.

Orchestra-leader-entrepreneurs do compete for orchestra engagements with other orchestra leaders. This is *alternative* (i) in the above listing. But no union has the legal



right to lay down the rules for competition among employer-businessmen like plaintiffs. It is also true that professional orchestra leaders like plaintiffs do compete for *engagement contracts*, even when they do not perform as leaders for such contracted engagements. This is *alternative* (iv) in the list set forth above. Once more, however, this is competition for business among leader-employers, which is not subject to lawful union regulation.

There are in New York City a handful of orchestra leaders who are *employees* (and "supervisors" within the statutory definition) and who therefore are paid wages. (E.g., Mr. Paige, of Radio City Music Hall.) There is not one jot or tittle of evidence in the record to show that any professional orchestra leader like plaintiffs ever competed with such employee-leaders either for their jobs or their wages. This eliminates *alternative* (v) in the foregoing listing.

There are employee-musicians who aspire to be leader-employers; and who, actuated by that aspiration acquire, from time to time, small contracts for musical engagements. They act as leader-employers *pro tanto*. They may seek gradually to build up businesses and reputations as leaders. But they can do this, not by remaining *employee-musicians* (sidemen or subleaders), but only by venturing into the business of the orchestra-leader-entrepreneurs and taking the risks of that business. Once they become businessmen and employers, they should no more be subject to union regulation than other businessmen. This also is *alternative* (i) stated above.

The foregoing analysis demonstrates the emptiness of the Unions' verbal fugue: "job and wage competition".

B. The Brief for the American Federation of Labor, Congress of Industrial Organizations as *amicus curiae* is, from start to finish, based upon similar, fundamental errors of fact: (i) that orchestra-leader-entrepreneurs like plaintiffs are "in direct wage and job competition with their

employees"; (ii) that defendant Unions in fixing prices and in restraining competition did not combine with non-labor groups; and (iii) that the shibboleth, "job and wage competition", is the "Open Sesame" leading\* to Union exemption from antitrust law liability. These massive errors make it unnecessary for plaintiff-leaders to waste much time in refutations and counter-arguments; because Plaintiffs' previous Briefs as well as their Cross-Petition amply expose these errors.

The AFL-CIO Brief is wide of the mark in basing its argument upon the demonstrably inept statement: "The Union activity in question does not take the form of a combination between labor and non-labor groups through agreements or otherwise" (p. 3). The Union price-fixing, suppression of competition and other monopolistic conduct in these cases could not possibly occur or become a market reality unless there were actual *combination* between the Unions and many non-labor groups (leader-employers, booking agents, hotels, nightclubs, restaurants, caterers, *et al.*). Moreover, since AFM insists on the use of its Form B contract for each musical engagement; and since the Form B contract expressly incorporates by reference all Federation and Local Bylaws (including those which impose prices, suppress competition, etc.); it is clear that AFM and Local price-fixing, suppression of competition, etc., are furthered through the Form B *agreements* (which necessarily imply *combinations*), signed by hundreds of thousands of purchasers of music and the involved orchestra-leader-employers. Form B contracts are also always used by booking agents.

C. Throughout their argumentation the Union Briefs blandly assume that the Federation and its Locals—unions which have for decades refused to engage in collective bargaining and which have unilaterally imposed closed shops in violation of the NLRA—are in precisely the same situation as those unions which, *in good faith* and obedient to statute, regularly bargain collectively with employers of

their members. The omnivorous "interests" of the law-breaking Unions here are invalidly *equated* in the Union Briefs with the legitimate *labor interests* of labor unions, which comply with Federal statutes and which deal with employers, as required by the definitions of "labor organization" appearing in the NLRA, in the Taft-Hartley Act and in the Landrum-Griffin Act.

For example, the AFL-CIO Brief states:

"\* \* \* It would, therefore, be inconsistent with the trend of Congressional action and of this Court's prior decisions to allow judicial evaluations of the importance of the *direct benefits for employees obtained from a collective agreement* as compared to the costs of the restrictions upon others." (p. 19; emphasis added)

In the instant cases, no benefits whatever were obtained for employees from any collective agreement. None "of this Court's prior decisions" involve a situation as anomalous as the instant cases, where the predatory practices of the Unions are revealed by extensive law-breaking.

There is simply no precedent in other unions for what the petitioning Unions have been doing in the entire musical industry since 1935.<sup>6</sup> Not one of the cases cited by the Union Briefs exhibits union conduct which so bristles with violations of statutes and with repudiation of the statutory meaning and function of labor unions. It is pious hypocrisy for such Unions to invoke repeatedly such nomenclature of "collective bargaining", "mandatory subjects of bargaining", "the trend of Congressional action" on labor subjects and "this Court's prior decisions" in labor law. The *Oliver*, the *Fibreboard Paper Products, Corp.*, the *Lake Valley*, the *Hutcheson*, the *Allen-Bradley*, the *Jewel Tea* and the *Pennington* cases all involved unions which bargained with employers.

D. No regular employer, plaintiffs submit, should ever be placed in a labor group. No authoritative case has ever done this.

## 2. The Alleged Evidence of Wage Cutting.

The AFM Brief (p. 58) quotes a booking agent, Joe Glaser: "If the leader can't get scale, he couldn't pay the sidemen's scale." The excerpt was taken out of context. In context, it simply means that a leader (like any other businessman), who *constantly* took in less than his wage expenses, would in the long run be unable to pay those wages (or to stay in business). Established professional orchestra leaders (like all businessmen) are not in business to sustain losses. Like department stores which advertise so-called "loss leaders", plaintiffs assert the right *occasionally* to take a loss, either by doing an engagement for nothing or by charging a nominal fee, where this is prudent business policy and good advertising. But in all such instances, they, like other businessmen-employers, always *pay full scale to their employees*; just as orchestra leader pay full scale to their sidemen, if the particular purchaser of music eventually fails to pay the price of the engagement. Glaser also testified (App. 62b): "After licensing, I would say it ["price-cutting"] was definitely and positively stopped."

Union witness Stevens is quoted (AFM Brief, p. 58) as a "leader". He is not, according to his own testimony, an established, professional orchestra leader. He has too few jobs per year to operate as *professional* orchestra leaders do. Moreover, he "frequently" acts as a sideman and as a subleader (fn. 21, p. 53. AFM Brief)—something *professional orchestra leaders* never do. The excerpt from Steven's testimony on direct examination (p. 58, AFM Brief) shows that *6 or 7 years ago* on unspecified occasions, *whose number is not revealed*, he submitted bids as an "orchestra leader", which were "below the Unions' minimum price." He admitted that, on such occasions, he paid

---

\* See the seventeen types of Union abuses listed in the Cross-Petition for Certiorari (pp. 23-24). These the Union Brief deprecates but does not deny.



his sidemen below the Union scale. Such a person, of course, does not speak for or typify plaintiffs.

But compare what Stevens said on direct, with what he said on cross examination (Tr. 3095-96):

“Q. When you acted as leader in the single engagement field who decided on the wages to be paid to the sidemen you were leading? A. Well, the Union because *I pay Union scale to the men and I may pay over but I don't pay below Union scale.*” (Tr. 3095; emphasis added)

### 3. The Alleged Threat Posed by “Working Employers”.

In their main Brief, defendant Unions revert *passim* to their “working employers” argument (p. 28; see also pp. 29, 30, 42, 43, 56). Defendant Unions consider it “unfair” for an orchestra leader to act as a leader *must* when leading his orchestra! Practically all orchestra leaders play instruments; and when they do so, they lead their orchestras by the manner in which they play. Defendants, apparently, want to unhook the locomotive from the train, expecting the train to get there just the same!

The Unions claim to represent both employers and employees. But they want only some of their members (employees) to work! They have bizarre notions of their duty equally to represent members.

“In other words, where a union in fact seeks to ward off unfair competition by working employers, its actions are immunized from antitrust liability because (1) a union may eliminate price competition based on differences in labor standards or (2) because a union may lawfully combine with members of a labor group or (3) because a union demand that a working employer receive a stated minimum is a mandatory subject of bargaining” (AFM Brief, p. 30). This complex statement reveals very starkly the conflict of interest necessarily implicit in the pretense of representing both *employers* and employees! It is built on



fiction: that there is unfair competition by "working employers" (Cross-petitioner's main Brief, Point IV and Supplement). Plaintiffs are not adverse to elimination of price competition *based on differences in labor standards set by collective bargaining*. But, the Unions here eliminate competition below *Union prices*, even where such competition is *not* based on differences in labor standards. (Within Local 802 there are *no* differences in labor standards for orchestra leaders.) Neither case law nor statute backs the statement that a union demand that a "working employer" receive a stated minimum is a mandatory subject of bargaining.

AFM and its Locals allegedly require orchestra leaders to become Union members for the following reasons (AFM Brief, p. 31):

(1) Orchestra leaders are working musicians who perform a musical service, whether they conduct by playing an instrument or by waving their arms. The underlying, erroneous innuendo is that orchestra leaders like plaintiffs perform services *identical* with employee musicians. See this Reply Brief, pp. 17-25 and fn. 15 p. 35.

(2) "A musician who is the leader on one engagement is more likely than not to be a subleader or only an instrumentalist on the next engagement." This statement is untrue, and has no support in the record, with respect to plaintiffs or other professional leaders.

(3) "Even those leaders who may not now act as sidemen began their careers as instrumentalists." This correct statement is hardly relevant; because plaintiffs were not professional orchestra leaders *when they began their careers as leaders*. Neither plaintiffs nor those in the class of plaintiffs act as sidemen today.

(4). "Musicians who perform club dates also compete for engagements in other fields \* \* \* in many of which the leader \* \* \* is unquestionably an employee." The quoted

statement is irrelevant, because plaintiffs are *employer-businessmen*. The number of *employee* orchestra leaders (such as Raymond Paige at the Radio City Music Hall and Leonard Bernstein at the New York Philharmonic) is negligibly small, numbering less than 10 in New York City. Such employee-leaders are, however, clearly "supervisors" as defined in the NLRA. Neither plaintiffs nor other professional leaders ever compete with such employee-leaders.

Mr. Manuti, then President of Local 802, very well understood that the membership of orchestra-leader-employers was an artificial and convenient contrivance to shield a group of businessmen from antitrust liability, as his own examination before trial revealed (App. 99).

#### 4. The Alleged Evidence of Displacement.

The AFM main Brief tries to exploit (pp. 7-9) the District Court's unsustained Finding 45 (App. 132) that orchestra leaders "displace the services of a sideman who otherwise would have been engaged to play the same instrument" played by the leader (p. 7); and that there "is a high degree of interchangeability" in work functions among orchestra leaders, subleaders and sidemen" (p. 8). In both form and substance these findings by the District Court are irrelevant speculations. They fail to take

---

<sup>7</sup> As was shown in plaintiffs' main Brief, p. 8, more than 90% of the Local 802 members who file contracts as "orchestra leaders" are really *sidemen*. This immediately differentiates them from plaintiffs and other professional leaders, who do not act as sidemen. Such sidemen number between eight and ten thousand. The "orchestra leaders" in this group of *sidemen* are in a sense interchangeable with *sidemen* and *vice versa*. See defendants' Exhibits L and M (App. 398b-400b) analyzed in Plaintiffs-Appellants' Brief in the Second Circuit, page 12; see also Cross-Petitioners' main Brief, page 9. In other words, the Max Sontag type of "orchestra leader" *ad hoc* and the Max Sontag type of *sideman* are, *in a sense*, "interchangeable" two or three times a year! But neither Max Sontag nor any sideman or subleader is interchangeable with any plaintiff or other established professional leader. A client who wants Ben Cutler would not choose one of Cutler's sidemen.

into account the economic realities of the music industry, as repeatedly reflected in the record. In those cases where the professional leader plays an instrument *while simultaneously discharging his distinctive and irreplaceable function of leading his orchestra*, he does so because he was engaged by his client to do so; and because he could have no business and could provide no jobs for sidemen *unless* he did so. He would never have been able to institute his orchestra and his business as orchestra leader if he, self-destructively, always refrained from leading by playing or singing or using his baton.

Even the Union witness, Stevens, who is not a professional or established orchestra leader, and who regularly performs as subleader and sideman, testified to the unique function of the leader. At first he answered negatively (Tr. 3054-55) the question whether there was a difference between the performances of leader and sideman on the same instrument. The Trial Court immediately picked up the direct examination:

"The Court: When you play the instrument and you are the leader, don't you lead?

The Witness: I lead with my trumpet, sir.

The Court: Is there any difference between the way you play as a leader and the way you play as a sideman?

The Witness: Not quality-wise nor quantity-wise. It would just be in motions.

The Court: Motions with what.

The Witness: With my trumpet. If I were leading the band—

The Court: There is a difference, isn't there?

The Witness: Yes." (Tr. 3055)

On cross examination, Stevens continued (Tr. 3087):

"Q. . . . I believe you indicated that when you play the trumpet as a leader you move the instrument or

you move your body in such a way to indicate leadership in one way or another. A. Yes, sir. That's true.

Q. But isn't there also another difference? As leader don't you call the tunes, the sequence of tunes?

A. As a leader \* \* \* I think that I control the band completely on the bandstand. \* \* \*

Q. When you are a sideman you do not have that control even when you play the trumpet? A. When I'm a sideman I do exactly what the leader wants me to do."

Respect for economic reality and for equal justice suggests that the orchestra leader's right to work as *orchestra leader* is at least as inviolable and as deserving of judicial protection against Union depredations (which threaten extinction of that right) as the employee's right to work. The latter right, as a matter of economic reality, depends upon the former. Without the former, it could not exist. Union contravention of the Sherman Act should not be excused in the instant cases by the ungrounded, unrealistic pretense that leaders are usurping the work of employee musicians. The leader's instrumental virtuosity, put to the use of *leading*, is initially the essential ingredient to his success as a leader. It is as much his characteristic function, as entrepreneur and employer in this field, as, in the automobile industry, it is the function of corporate executives to conduct the affairs of the corporation without union interference and without union dictation that union members should be allowed to perform those executive chores, where they are able to do so; because "otherwise" the executive is displacing a capable union member! There will always be some union members who could do at least *some* of the work performed by businessmen and shopkeepers. That gives no union the right to prohibit businessmen and shopkeepers from working as such.



The error of the Trial Court stems from the radical fallacy expressed in the Unions' main Brief as follows:

"\* \* \* in playing instruments leaders perform functions *identical* with those of acknowledged employees—sidemen—who are also union members." (p. 7; emphasis added)

The functions of orchestra leader and his employee-musicians are *not identical* (as the diverse treatment given leaders and employee musicians in AFM and Local 802 by-laws attests), whatever their apparent similarity.<sup>8</sup> Inter-

---

<sup>8</sup> There is a *similarity* but certainly not an *identity* between the leaders of "the big bands" (men-like Tommy Dorsey, Paul Whiteman, Guy Lombardo, Les Brown, Lester Lanin, Ben Cutler, *et al.*) and the type of orchestra leader, generally known as "conductor" (Toscanini, Pierre Monteux, Bruno Walter, Tullio Serfin, Carl Schuricht, Sir Thomas Beecham, Stowkowsky, Ernest Ansermet, Klemperer, *et al.*) who leads symphony and opera orchestras. In any listing of orchestra leaders the great conductors would, of course, be on top. What they mean to symphony orchestras and operatic ensembles is well known, at least superficially, to most civilized persons. The following somewhat florid and flamboyant quotation from "The Great Conductors" by Harold C. Schonberg, Music Critic of the New York Times, published in December, 1967 by Simon & Schuster, New York, shows the *similarity* and negates the *identity*. The classical conductors are probably almost always independent contractors. Even when they are employees, they are certainly "supervisors" within the definition given by the NLRA (Tr. 2859-65).

"He is of commanding presence, infinite dignity, fabulous memory, vast experience, high temperament and serene wisdom. He has been tempered in the crucible but he is still molten and he glows with a fierce inner light. He is many things: musician, administrator, executive, minister, psychologist, technician, philosopher and dispenser of wrath. Like many great men, he has come from humble stock; and like many great men in the public eye, he is instinctively an actor. As such, he is an egoist. He has to be. Without infinite belief in himself and his capabilities, he is as nothing.

"Above all, he is a leader of men. His subjects look to him for guidance. He is at once a father image, the great provider, the fount of inspiration, the Teacher who knows all. To call him a great moral force might not be an overstatement.

(Footnote continued on following page)



changeability, such as the Unions allege, is a Union myth suggested by the exigencies of argumentation. No one knows better than the sideman that he is not substitutable for the *professional leader*, no matter how ardently he might wish he were. This leader was able to establish himself and his business precisely because he (and not sidemen) did the sort of things which built up his reputation as an orchestra leader to the point where he acquired a following. One of the important functions of some leaders is

*(Footnote continued from preceding page)*

Perhaps he is half divine; certainly he works under the shadow of divinity (or so a certain school of romantic idealism would have us believe). He has to be a strong man; and the stronger he is, the more dictatorial he is called by those he governs. He has but to stretch out his hand and he is obeyed. He tolerates no opposition. His will, his word, his very glance, are law.

"Sometimes his name is Wilhelm Furtwängler, sometimes Arturo Toscanini, sometimes Fritz Reiner, Leonard Bernstein, Arthur Nikisch or Otto Klemperer. It makes no difference. Whatever his name, he stands in front of a group of musicians as their conductor. He is there because somebody has to be the controlling force. Somebody has to set the tempo, maintain the rhythm, see to it that proper ensemble and balances are kept, try to get out of the score what the composer put into it. From his baton, from the tips of his fingers, from his very psyche, flows some sort of electric surcharge that shocks a hundred-odd prima donnas into bending their individual wills into a collective effort. His ears have a hundred-odd invisible tentacles, each one plugged, switchboard-like, into the very subconscious of each player under his command. Let one of those men play a faulty phrase or a wrong note, and that particular tentacle twitches. Immediate wrath then descends.

"He plays on these hundred-odd men, and gets his results in a variety of ways.

\* \* \*

"Through his orchestra the conductor translates musical symbols into meaningful sound. Each conductor reads the symbols differently, for each is a different human being. 'How far is up?' asks the child. 'How fast is fast?' To the conductor, these are far from childish questions. How fast is fast? When Mozart writes 'allegro', is it a pace, a trot or a gallop? Each conductor has his own ideas. All he can do is follow his instincts, based on years of thought and study." (pp. 15, 16, 17, *passim*)

*to lead while and by playing his instrument.* As the Trial Court elicited from Union witness, Stevens (*supra*), there is a decisive difference between the manner in which an orchestra leader plays an instrument and the manner in which the sideman plays the same instrument. See Cross-petitioners' main Brief, pages 24-27, §§ 12-13. By playing his instrument the orchestra leader sets the pace, maintains the rhythm and the ensemble, and indicates the musical phrasing, the dynamics, the tempo, the emphases and the right balances for his employee-musicians to use. In other words, the leader *leads*; and the sideman *follows*, even when both of them play the same instruments at the same time during an engagement. *A leader is absolutely essential for any ensemble performance.* Every good orchestra needs a "controlling force". Obviously, a leader who merely uses a baton or sings, cannot plausibly be said to "replace" any instrumentalist.

Moreover, the record shows that orchestra leaders do not always instrumentalize. Most of them, like orchestra leaders Carroll and Ames, never play an instrument when their orchestras number more than eight (Tr. 958; 960-61; 1427). Some of them, like Peterson, never play an instrument (Tr. 1977-85) while leading. All of them decide when and whether they will play their instruments or not (Tr. 958). None performs on an instrument continuously during engagements. On the other hand, the sideman must perform continuously. If he is competent and docile enough to be a good sideman, he follows the direction of the leader. Otherwise, he is discharged or simply never again hired.

Every intelligent person, ordinarily conversant, even as a layman, with orchestra practice, knows that the function of the orchestra leader is not identical with that of the employee-musicians. The Trial Court's finding and the Union argument in this connection affront common sense. No unattested finding by a District Court can bridge the semantic gap between "identical" and "similar", to make them the same in meaning. For a further discussion

of the employer-businessman's right to function as such see Cross-Petitioner's Brief in Opposition to Petition for Writ of Certiorari, Point III, pages 15-18.

The record is bare of any evidence whatever that orchestra leaders like plaintiffs are *interchangeable* with their employees. Indeed, such "interchangeability" does not literally characterize even *ad hoc* orchestra leaders like Max Sontag (p. 798 ff. 1962 Trial), who obtains about three assignments as an orchestra leader per year from friends or relatives. Obviously, the latter did not regard Sontag as interchangeable with sidemen. But even if they did, that would not be relevant in the instant cases which involve only established, professional orchestra leaders. The clerk in a businesshouse who on occasion does some work which is similar to that of the business executive, the clerk in a shop who sometimes discharges duties similar to those performed by the shopkeeper is *not* "interchangeable" with the business executive or shopkeeper. The fact that the clerk can do some work similar to that performed by executive or shopkeeper should not, in a respectable jurisprudence, permit unions to decide, on some argument or catch-phrase like "displacement of employees", "interchangeability", or "job and wage competition", that neither shopkeeper nor business executive shall do work pertaining to their executive or managerial specialities, unless they submit to union bylaws.

The AFM Brief confuses the issue by suggesting repeatedly that the instant appeals concern the vast majority of those Local 802 members who act as sidemen.<sup>9</sup>

---

<sup>9</sup> "In fact the vast majority of Local 802's members who act as orchestra leaders do so only occasionally; they are primarily sidemen." (AFM Brief, p. 9)

Exactly because they are "primarily sidemen", they merely "act as orchestra leaders". They are not said to *be* "orchestra leaders". Plaintiffs and the class represented by plaintiffs are not in that "vast majority".

What is or may be true of the "vast majority" of Union members who, now and then, act as "orchestra leaders" is obviously not necessarily true of *professional orchestra leaders*. If Max Sontag (typical of *ad hoc* leaders) were "interchangeable" with a sideman, it does not follow that "orchestra leader" Max Sontag or his sideman is interchangeable with any professional leader, like plaintiffs.

The Union Brief (p. 7) claims that "leaders' witnesses testified that an orchestra leader, in playing an instrument, fills the requirement for an instrument in the orchestra *just as any sideman does*" (emphasis added). This representation is based upon an equally erroneous, and utterly baseless, finding of the District Court (#44, App. 132) *allegedly* founded upon the following citations to the Transcript: Tr. 194-95, 842, 1313-14, 1353, 1375-76, 3054-55. Examination of these pages, however, reveals that they do not warrant either the finding of the Trial Court or the Union representation.<sup>10</sup>

---

<sup>10</sup> Tr. 194-95 has nothing whatever to do with the proposition for which it was cited.

Tr. 842 actually contradicts that proposition. There, orchestra leader Kahner states that, when he uses a subleader to play a saxophone in his own stead, he hires as a replacement one who is *more than a saxophonist*, namely, a subleader *able to lead* while playing his instrument. Otherwise, he uses a subleader who plays a different instrument.

Tr. 1313-14 is part of the testimony of orchestra leader Sherry who agrees with Kahner.

Tr. 1353 is part of the testimony of orchestra leader Lefcourt, a pianist, who stated in effect that he would replace himself only "with a man in charge, a subleader", who could play the piano.

Tr. 1375-76 gives the similar testimony of orchestra leader Flatte.

Tr. 3054 is reproduced at page S-13 of the Supplement to Cross-petitioners' main Brief. It has nothing whatever to say on this subject. But in Tr. 3055 (already quoted above) Union witness Stevens, who is *not* a professional orchestra leader (but who does *lead* about 25 times per year and also regularly serves as a subleader and as a sideman) leads his orchestra *by playing his trumpet* in a different, distinctive way.

(Footnote continued on following page)



Thus, it is untrue to say that an orchestra leader, by playing an instrument, simply fills a "requirement for an instrument in the orchestra, *just as any sideman does.*" The essential difference is the ability of the musician to *lead*. This is the leader's *forte*. It is also the needed qualification of the leader's *supervisor*<sup>11</sup> (namely, his sub-leader) in the *one or two cities* where subleaders are *sometimes* used, and of any sideman-turned-leader who attempts to assemble an orchestra and to "lead" it.

---

(Footnote continued from preceding page)

In fact, the only testimony which the Trial Court cited (in Finding No. 45, App. 132) as having a bearing on the question of displacement of employee musicians was the interested, conclusory testimony of Max Arons (Tr. 3657):

"Q. Do you recall also saying in this same affidavit: 'All that the Union has been attempting to do is to enforce uniform terms and conditions for all persons performing labor in connection with musical engagements whether the labor consists of playing an instrument or conducting the other musicians.'?"

A. That's correct. In my forty years as an official, I have seen sidemen become leaders and I have seen leaders become sidemen again. To me they are all working men who are members of the Union and need the protection of the Union.

Q. When you use the words, 'uniform conditions' what was it you had in mind? A. Will you restate the question?

Q. When you use the words 'uniform conditions' what did you have in mind? A. *To me a man who acts as a leader and plays an instrument or conducts is a working man, in other words, he is replacing somebody who played his instrument and uniformly he should belong to the Union and his wages should be set and he should get the benefits, fringe benefits, when we negotiate, he should get the benefit of collective bargaining when we negotiate for him and to me except for the exceptional case, the majority of members are working men. The mere fact that he is a leader does not take him out of the category of working for a living.*" (emphasis added)

This is a pitifully inadequate basis for the Trial Court's conjectures about "replacement" and "interchangeability."

<sup>11</sup> Throughout the trial plaintiff orchestra leaders took the position that subleaders are, in fact and in law, "supervisors" (as defined in the NLRA) of employees of the orchestra leader.



## 5. The *Oliver* Case.

The briefs of petitioning Unions and of AFL-CIO rely heavily upon a caricature of the *Oliver* case (See AFM Brief, pp. 23-24, 34-35, 37, 41-42, 45-46, 53-55, 57 and 66). The following comparison between the instant cases and *Oliver* demonstrates that Union reliance upon *Oliver* is misplaced; and that "the economic factors which govern the unions' actions" here are *not* "identical to those in *Oliver*". (Unions' Brief, p. 42):

1. In the *Oliver* case, there was multi-state collective bargaining between employers and union; in the instant case there never was bargaining between plaintiff orchestra-leader-employers and AFM or its Locals; and no-bargaining is a deliberate AFM policy. Canons of law developed out of the duty to bargain collectively have no valid application to protect the Unions here.

2. The so-called *independent contractors* in *Oliver* were *owner-drivers*. They were not *employer-businessmen*. They did exactly the same work as union members who were *employee-drivers*, who did not own the trucks they were driving. In the instant case, plaintiffs and the class represented by them are all *employers and businessmen*. They are *not* interchangeable with their employees and *vice-versa*; and they do not perform the same work.

3. In *Oliver*, this Court did *not* decide whether the owner-drivers were or were not in a "labor group". In the instant cases, the Trial Court erroneously placed orchestra-leader-entrepreneurs and *employers* in the "labor group".

4. No claim was made, in the *Oliver* case, of violation of the Sherman Act. The only law violated was a State law, which contravened paramount Federal law. In the instant case, the Unions, acting in combination with *non-labor groups*, flout the Sherman Act, as construed in *Allen-Bradley*.

5. In *Oliver*, a finding that the owner-drivers constituted a "labor group" would have been anomalous, because that category is significant only under the antitrust laws; and no Federal antitrust law violation was charged in the *Oliver* case. In the instant cases, however, the anomaly is that the Trial Court found *businessmen-employers*, like plaintiffs, to be in a "labor group".

6. There was a collective bargaining agreement in *Oliver* and the owner-drivers were covered by it; no *employer* was in the bargaining unit or in the Union. In the instant cases, there never was a collective bargaining agreement and orchestra-leader-employers are union members.

7. The collective agreement in *Oliver* contained an Article XXXII which regulated "minimum rentals and certain other items of lease when a motor vehicle is leased to a carrier by an owner who drives his vehicle *in the carrier's service*" (at p. 284, emphasis added). The owner-drivers were in fact *in the service* of carriers; i.e., they were for all practical purposes regarded as employees of the carrier. They were indistinguishable in function from other truck-driver-employees who were not owner-operators. Functionally, they were employees, substitutable for employees. In the instant case the plaintiffs are not in the *service of any employer*.

8. In *Oliver* the competitor owner-drivers did not produce jobs or employment for the non-owner drivers. The carriers produced jobs for both sorts of drivers. In the instant cases, the orchestra-leader employers produce<sup>12</sup> jobs

<sup>12</sup> The AFM Brief (pp. 53-54) makes the ridiculous statement:

"The record shows an abundance of competition among leaders of no particular fame to provide music which the purchaser has planned, and no evidence that as much as one club date engagement has ever taken place because a leader created the demand." In the

(Footnote continued on following page)

for the employee musicians. The latter do not produce jobs, anymore than did the drivers.

9. The AFL-CIO discussion of the *Oliver* case (p. 24 of its Brief) is relevant here:

"In *Oliver*, as here, the union sought to regulate the minimum compensation received by independent contractors, who were in direct job and wage competition with employee union members since they render essentially the same service."

Actually, in *Oliver*, there was job and wage competition because there was no job uniqueness. Driving a truck was exactly the same chore for the owner-driver as for the non-owner-driver. In fact practically anybody can drive a truck. It is, obviously, not so easy to become a professional orchestra leader. No established, professional orchestra leader renders essentially the same labor service as his sidemen. The sideman does not provide jobs for other sidemen. The sideman is not interchangeable with the established, professional orchestra leader. If he were, he would improve himself by becoming an orchestra leader (whose profits supply greater income

(Footnote continued from preceding page)

first place, the competition among leaders "of no particular fame" does not affect plaintiffs or other established, professional orchestra leaders who have built up at least the kind of reputations which provide them with clienteles which are steady and profitable. Clients of plaintiffs and of other established and professional orchestra leaders do *not* plan the music supplied by their orchestras. As to the comment that there is no evidence that even one club date has ever taken place because a leader created the demand, there are two answers. There is repeated and undenied evidence that professional leaders engage in advertising and constant solicitation of accounts. These create demand. In the second place, if established, professional orchestra leaders do not create the demand for music, how does that demand arise? Certainly not because of *ad hoc* leaders, like Max Sontag. Nor is it because of any work performed by the sideman or Union. Actually, what the Union has been doing has decreased the demand for music in recent years.

than the wages of sidemen). Even when an orchestra-leader-employer performs an instrument, he does not render "essentially the same service." He *leads* his orchestra by doing so and in doing so: his musical phrasing, his dynamic emphases, his balancing of tempo and dynamics, the nods of his head and the other signs or signals which he gives to his sidemen differentiate *his* playing from that of his sidemen, who must follow his leading. The orchestra leader almost *never* plays an instrument *throughout* his engagement. He performs when he thinks he should. The sideman must play his instrument during the whole engagement. Thus, there is *no* job or wage competition between the orchestra leader and his sidemen. No established professional orchestra leader in his right mind would want to compete with his own or any employee musicians for either their jobs or their wages.

10. In the instant cases, defendant Unions, unlike the Union in *Oliver*, evade their statutory duty to bargain collectively with orchestra-leader-employers by unilaterally substituting Union bylaws for labor contracts. It can hardly be argued that unilateral imposition of Union bylaws is the equivalent of a labor contract.

11. The narrow question before this Court in *Oliver* (358 U. S. at 285 and 295) was whether "Ohio's antitrust law may be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which the Federal law directs them to bargain." In the instant cases, there was no carrying out of any labor agreement, because there was no such agreement. AFM and Local bylaws are part of a Union system of law evasion respecting subject matters as to which no "Federal law directed the parties to bargain."

12. Article XXXII of the collective bargaining agreement in *Oliver* was, according to this Court's decision, necessary to prevent undermining of the *negotiated*

drivers' wage scale (at p. 289); because the carriers had exploited the lessor status of owner-drivers for the purpose or with the effect of threatening the wage standards of the Union. In the instant cases, there never was exploitation of employee-musicians by established, professional leaders. There was *Union* wrong-doing: minimum prices, Union suppression of competition, coercion of leader-employers into the Union, dictatorial and unlawful mandate of closed shops, etc., which are not in any sense necessary to prevent undermining of "negotiated" wages, both because there were no negotiations, and because Federal law forbids such wrong-doing. The unlawful Union practices in these cases were *not* necessary to prevent undermining of the unilaterally promulgated Union wages; because all witnesses agreed that leader-employers uniformly pay the minimum wages unilaterally (and unlawfully) prescribed by defendant Unions. See in this connection the testimony of AFM President Kenin (1, 26-27); Manuti, President of Local 802 (68-69, 75-76); booking agent Willard Alexander (189-90, 193, 195-96); Local 802 official Brown, charged with policing engagement contracts (241-42); Local 802 Secretary (now President) Arons (Tr. 3655).<sup>13</sup>

13. In *Oliver* price-fixing was not really involved, but only wages. Thus, this Court said: "Looked at in this light \* \* \* to determine its relevance to collective bargaining rights under the Federal Act, the point of the Article [XXXII] is obviously not price-fixing but wages." In the instant cases, price-fixing is undeniable and is admitted in the AFM main Brief at pp. 11, 24-27, 32, 42, 43, 47, 48, 51, 52-53, 59; although at other places, defendant Unions seem to deny price-fixing (16, 30-32, 42-46).

<sup>13</sup> Neither plaintiffs Carroll nor Peterson has been a Union member for 6 years. Yet they have constantly paid Union scale during that time. The Unions' main Brief states (p. 12): " \* \* \* When a leader receives less than union scale from the purchaser, the sidemen invariably receive less than scale wages", as if this were a natural law. But the statement is contradicted by the record.



14. In *Oliver*, there was *no* combination by the involved union with *non-labor groups*; in the present cases such combination has plainly been in operation for years; and it is highly efficient.

15. The *Oliver* case was not complicated by the existence of a group of marginal truck drivers. The instant cases are somewhat confused by the existence of a large group of *marginal* "orchestra leaders". Defendant Unions, the Trial Court and the Second Circuit (especially Judge Friendly) were all misled by the existence of a very large group<sup>14</sup> of *ad hoc* orchestra leaders (*employee musicians* who *on occasion* file contracts as "orchestra leaders") into disbelieving the existence of a class of *established, professional orchestra leaders* like plaintiffs. However, it is not logical to discredit the existence of a class of established, professional orchestra leaders simply because there is a larger class of *ad hoc*, marginal orchestra leaders (who do not earn their livelihoods as such; who enjoy no reputation in their localities; and who have not, by the excellence or popularity of the bands they occasionally assemble, acquired clienteles which can be depended upon to provide livings for such leaders).

---

<sup>14</sup> Mortimer J. Adler in "*The Conditions of Philosophy*" (Athenum, New York, 1965) wrote illuminatingly upon the gradations of beings or persons to whom a particular category or universal idea can be applicable; and what he wrote reveals analogously the root error committed below with respect to the universal, "orchestra leaders":

"There is a continuum, as I see it, between the novice in any sport, and the champion player of the game. They are both engaged in playing tennis, golf, or baseball, though the one does it with little and the other with consummate skill. The vast difference in degree of competence which separates them does not prevent us from acknowledging that both are playing the same game. On the contrary, precisely because it is the same game, we also recognize that the inexperienced at it can learn from the more expert, acquiring through imitation and practice higher degrees of skill and satisfaction. The same holds true of every

(Footnote continued on following page)

16. In *Oliver*, there was proof that the union wage scale for owner-operators *would be subverted* by permitting owner-operators (who were all union members) to charge any rental whatever for their trucks. In the instant cases, there was no proof whatever of subversion by plaintiffs or other professional orchestra leaders, of any Union scale. Professional leaders always pay at least Union scale.

17. In *Oliver*, the contract regulation was only "*in form* a scheme for fixing prices for the supply of leased vehicles \* \* \*" (381 U. S. at 690, note 5). In the instant cases, AFM and Local Bylaws *both in form and in substance* are schemes for fixing prices, for monopolistically regimenting the industry, for unreasonably interfering with interstate commerce and for suppression of competition.

---

(Footnote continued from preceding page)

art. The child who begins to draw pictures or the man who begins to paint stands at one end of a continuum which has Leonardo or Michelangelo at the other. The woman who plans and cooks meals may never become Escoffier but she improves by acquiring in some degree the understanding and techniques of culinary matters which lesser cooks, who are her preceptors, pass on to her.

"Thus it is with the philosophizing done by the layman and the professional. Both are engaged in the same intellectual activity. The difference between Socrates and the ordinary man, each thinking about the nature of things, the choices that life presents, and the values which bear on them, is one of degree, not of kind, as is the difference between the champion at a particular sport and the tyro or the difference between Leonardo or Escoffier in their particular arts and the novice \* \* \*" (pp. 9-10)

The established, professional orchestra leader, like any of the plaintiffs is also part of such a *continuum*, as Adler describes. At one end are the leaders of "The Big Bands", and, doubtlessly, above them "The Great Conductors" (see footnote 8, p. 19, *supra*). At the other end are the Max Sontags, who improvise as "orchestra leaders" two or three times a year. A line must be drawn across this continuum to cut off from consideration in these cases the "vast majority" of "orchestra leaders" who, unlike plaintiffs, do not earn their livelihoods from leading, have no regular employees, have no stable or dependable clientele and have no reputations or fame as leaders.

The foregoing seventeen *differentiae* demonstrate that the *Oliver* case cannot be used to defend the Union conduct here.

#### 6. The *Senn* Case Distinguished.

In *Senn v. Tile Layers Protective Union*, 301 U. S. 468 (1937), an independent contractor, named Paul Senn, was engaged in the tile-laying business, generally without an employee. His annual income was extremely modest, being about \$1,500 per year. About half of this amount was derived from his own manual work. Occasionally, depending on his contracts, he used one helper and one tile layer. Senn refused to sign an agreement with the union because under union rules he would not be allowed personally to work with his helper. Strike and picketing ensued; and Senn sought an injunction. This Court (four Justices dissenting) held that there was reasonable ground for the presumption: (1) that the closed shop (which at that time was lawful under Federal law) as well as the union rule prohibiting employers from working were actually necessary to maintain standards in the disorganized industry and (ii) that for the unions to have set aside its rules in the case of Senn would have been to discriminate against other employers.

This Court also held that there was no constitutional objection to a State's refusing to grant injunctive relief against picketing to obtain a closed shop. It upheld the *right of a union to picket* for the purpose of inducing an employer to sign a closed shop which would forbid him, as employer, to work with his hands and tools, saying:

"The State may, in the exercise of its police power, regulate the methods and means of publicity as well as the use of public streets. . . . The legislature in Wisconsin had declared that 'peaceful picketing and patrolling' on the public streets and places shall be permissible 'whether engaged in singly or in numbers'

provided this is done 'without intimidation or coercion' and free from 'fraud, violence, breach of peace or threat thereof.' " (*Ibid.*, at pp. 478-80)

The decision of this Court in *Senn* was significantly influenced by the demoralized conditions in the tile laying industry; and by the need for some rule to prevent then-rampant, *fraudulent partnerships* in the industry, where workers were dubbed "partners" and were then left without workmen's compensation coverage. [Professional leaders always cover their employees with required insurances. The record shows this without contradiction.]

Before *Senn*, a strike to prevent an employer from working with his men had been generally regarded, as the four dissenting Justices regarded it in the *Senn* case, as a strike to deprive the employer of constitutional liberties. *Truax v. Corrigan*, 257 U. S. 312 (1921); *Truax v. Raich*, 239 U. S. 33 (1915); *Roraback v. Motion Picture Operators Union*, 140 Minn. 481 (1918); *Hughes v. Kansas City Motion Picture Machine Operators*, 282 Mo. 304 (1920); *Parke Paint & Wallpaper Company v. Local Union*, 87 W. Va. 631 (1921).

1. *The Senn case distinguished from the instant cases.* The *Senn* case hearings were concerned mainly with questions of State law. The State courts had ruled that the controversy was a "labor dispute" under the State anti-injunction act and that the acts done by defendant union were lawful. The issues involved construction and application of a State statute and of the State Constitution; and as to them judgment of the State's highest court was conclusive. No similar statements can be made about the instant cases.

*Senn* did contend that the right to work in his business with his own hands is a right guaranteed by the Fourteenth Amendment and that the State may not authorize unions to employ publicity and picketing to induce him to refrain

from exercising it (301 U. S. 468, 478). Judgment of the highest court of the State had established "that both the means employed and the ends sought by the union are legal under its law". Therefore, the question before this Court in *Senn* was "whether either the means or the end sought is forbidden by the Federal Constitution." In the instant cases, we are concerned not with Constitutional law but with the Sherman Antitrust Act, as construed in *Allen-Bradley* and similar cases. In *Senn*, the employer was protesting against picketing and publicity. In the instant cases, cross-petitioners are protesting against violation of the Sherman Act. This Court held in *Senn* that:

"Members of the union might, without special statutory authorization by a State make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. \* \* \* If the end sought by the union is not forbidden by the Federal Constitution, the State may authorize working men to seek to attain it by combining as pickets, just as it permits capitalists and employers to combine in other ways to attain their desired economic ends."

The combination in the instant cases has for its purpose or effect not dissemination of information, but violation of a valid Federal statute, as construed in *Allen-Bradley*. In *Senn*, the majority of this Court made no ruling about the right of an employer to work as such; it merely held, in effect, that a union also had a right to picket and to engage in publicity, no matter how the picketing and publicity affected the employer's business. In the instant cases, defendant Unions claim the right to do unlawful things (such as price-fixing and suppression of competition) as corollaries to indefensible assertions: (i) that employers may be forced into Union membership along with their employees and thus be made to obey Union bylaws; and (ii) that employers like plaintiffs, who work at their professions according to the common and accepted mode of functioning in that pro-



fession, are threats to the jobs and wages of other Union members. *Senn* performed the *identical work* performed by the tile layers he occasionally hired as employees. Orchestra leaders do *not* perform work identically like that done by sidemen or even subleaders.<sup>15</sup> At the time of the *Senn* case, there was no Federal law which prohibited unions from coercing employers or self-employed persons into union membership. There is such a statute today. Plaintiffs here supply sidemen with jobs and wages; and they can do that only on condition that they are allowed to function as orchestra leaders normally function and are required by the public to function.

2. *The Senn case is outmoded by Federal law.* The NLRA, as amended, forbids the closed shop and forbids unions from "forcing or requiring any employer of self-employed person to join any union \* \* \*" (§ 8 (b) (4) (A)) by inducing or encouraging any employee to refuse to perform services for such employer. The Unions in the instant cases "represent" and *purport to represent* plaintiffs' employees. They assert, also, the right and power to refuse to permit those employees to work for plaintiffs, unless the latter comply with Union bylaws fixing prices and suppressing competition. None of these factors was present in *Senn*, which is outmoded because of the Taft-Hartley and Landrum-Griffin Acts.

3. *The Senn case should be overruled.* Because of intervening Congressional amendments, the rationale of the bare majority in *Senn* deserves reappraisal (See especially

---

<sup>15</sup> In addition to exercising the skill of a sideman the leader has the ability to impress on his orchestra his individual style, his rhythm, tempo, tone coloring, balance and ensemble qualities. He also has the business acumen to convert the collective performances of sidemen and subleaders into a marketable musical commodity. As entrepreneur, he negotiates engagement contracts which his reputation and advertising attract. Thus he is creative not only artistically but also businesswise, thereby augmenting employment.

NLRA § 8 (b) (4) (A)). Unions today (least of all AFM Unions) are not demoralized as was the tile laying union in *Senn's* case. There is no danger here from false partnerships or loss of legally required insurances, as there was then in the construction industry. Especially against the background of statutory change, the dissent in *Senn* seems more conducive to equal protection of laws, more in conformity with the objectives of true administration of justice, more consistent with regnant legislative policy and more sensitive to the demands of due process than the opinion of the bare majority in 1937.<sup>16</sup>

<sup>16</sup> Particularly applicable here is the following rationale from Mr. Justice Butler's dissenting opinion:

"The principles governing competition between rival individuals seeking contracts or opportunity to work as journeymen cannot reasonably be applied in this case. Neither the union nor its members take tile laying contracts. Their interests are confined to employment of helpers and layers, their wages, hours of service, etc. The contest is not between unionized and other contractors or between one employer and another. The immediate issue is between the unions and plaintiff in respect of his right to work in the performance of his own jobs. If as to that they shall succeed, then will come the enforcement of their rules which make him ineligible to work as a journeyman. It cannot be said that, if he should be prevented from laboring as a helper or layer, the work for union men to do would be increased. The unions exclude their members from jobs taken by non-members. About half the contractors are not unionized. More than 60% of the tile layers-union are non-union men. The value of plaintiff's labor as helper and tile layer is very small—about \$750 per year. Between union members and plaintiff there is no immediate or direct competition. If, under existing circumstances, there ever can be any, it must come about through a chain of unpredictable events making its occurrence a mere matter of speculation. The interest of the unions and the manual labor done by plaintiff is so remote, indirect and minute that they have no standing as competitors. *Berry v. Donovan*, 188 Mass. 353, 358 \* \* \*. Under the circumstances here disclosed, the conduct of the unions was arbitrary and oppressive. *Roraback v. Motion Picture Machine Operators Union*, 140 Minn. 481, 486, 168 N. W. 766, 169 N. W.

(Footnote continued on following page)

By the 1947 and 1959 amendments, Congress wanted to exclude "supervisors" from the employees' bargaining units. *A fortiori*, employers should be excluded.

### Conclusion

The judgment of Second Circuit reversing the District Court on the issue of price-fixing should be affirmed; its judgment on the issues of suppression of competition, unreasonable burdens on interstate commerce and other monopolistic practices of defendant Unions should be reversed or modified to grant plaintiffs the relief sought in their complaints; and professional orchestra-leader-employers should be excluded from membership in defendant Unions.

GODFREY P. SCHMIDT,  
Attorney for Cross-Petitioners-Plaintiffs,  
100 West 42nd Street,  
New York, N. Y. 10036.

Tel.: 212-279-0355

---

(Footnote continued from preceding page)

529, 3 A. L. R. 1290; Hughes v. Motion Picture Machine Operators, 282 Mo. 304, 221 S. W. 95."

Toward the end of his dissent, Justice Butler pointed to the inherent violation of "a principle of fundamental law: 'that no man may be compelled to hold his life or the means of living at the mere will of others.'" Orchestra leaders' regimentation by the defendant Unions makes a mockery of this principle and of freedom under law.



JUN 14 1968

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1967

No. 309

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED  
STATES AND CANADA, *et al.*,

Petitioners,

*vs.*JOSEPH CARROLL, *et al.*,

Respondents.

No. 310

JOSEPH CARROLL, *et al.*,

Petitioners.

*vs.*AMERICAN FEDERATION OF MUSICIANS OF THE UNITED  
STATES AND CANADA, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT**CROSS-PETITIONERS' (PLAINTIFFS')  
PETITION FOR REHEARING**GODFREY P. SCHMIDT,  
Attorney for  
Cross-Petitioners-Plaintiffs,  
100 West 42nd Street,  
New York, New York.

Tel: 212 279-0355



# INDEX

## CASES CITED

	PAGE
American Medical Association v. United States, 317 U. S. 519 (1942) .....	27
Arabian American Oil Company v. Farmer, — U. S. — .....	25
Associated Musicians, Local 802 and Ben Cutler, 164 NLRB No. 8 .....	1F
Associated Musicians, Local 802 and Charles Peterson and National Association of Orchestra Leaders, 171 NLRB No. 149 .....	10
Bartels v. Birmingham, 332 U. S. 126 .....	11, 29
Carroll v. Associated Musicians of Greater New York, 284 F. 2d 91 (2nd Cir. 1960); affirming 183 F. Supp. 636 .....	11
Carroll v. AFM, 294 F. 2d 484 (2nd Cir. 1961) .....	11
Carroll v. AFM, 372 F. 2d 155 (C. A. 2) .....	11
Cutler v. AFM, 316 F. 2d 546, cert. denied 375 U. S. 941 .....	11
Carroll v. Musicians, 206 F. Supp. 462 .....	20
Columbia River Co. v. Hinton, 315 U. S. 143 (1941) ..	27
Cutler v. Musicians, 211 F. Supp. 433 .....	20
Cutler v. United States (Court of Claims), 180 F. 2d 360 .....	11, 29
General Foods Corporation, Birds Eye Division, 110 NLRB 1088 (1952) .....	26

	PAGE
Gulf Coast Shrimpers and Oysters Association v. United States, 230 F. 2d 658 (5th Circuit 1956), certiorari denied, 352 U. S. 927, rehearing denied 352 U. S. 1099 (1957) .....	27
Hampton Roads Broadcasting Corp., 98 NLRB 1090 (1952) .....	26
Hinton v. Columbia River Packers Association, 117 Fed. 2d 310, 313 (Ninth Circuit, 1941), reversed 315 U. S. 143, 147 (1942) .....	20, 23, 28, 30
Los Angeles Meat Drivers Case, 371 U. S. 94 ..	11, 14, 23
Marty Levitt and AFM and Local 802, 171 NLRB No. 94 .....	11
National Labor Relations Board v. Hearst Publications Co., Inc., 322 U. S. 111 (1944) .....	30
National Labor Relations Board v. Miranda Fuel, Louisville and Nashville Railroad Co., 323 U. S. 192 (1944) .....	32
NLRB v. Steinberg, 182 F. 2d 850 (C. A. 5, 1950) ..	21
Reno Musicians Protective Union Local 368 and Foster S. Edwards, et al., 170 NLRB No. 56 ..	17
Schwartz v. Associated Musicians, 340 F. 2d 222 (2nd Cir. 1963) .....	11
Taylor v. Local 7, International Brotherhood of Journeymen Horseshoers, 352 F. 2d 598 (4th Circuit 1965), certiorari denied, 384 U. S. 967 (1965) .....	27
Teamsters Union v. Oliver, 358 U. S. 283 .....	5
United States v. National Association of Real Estate Boards, 339 U. S. 485 (1950) .....	27

## STATUTES AND MISCELLANEOUS

## PAGE

## National Labor Relations Act

Section 2(3) .....	21
Section 8(b)(4)(A) .....	21, 26
Section 158(b)(4)(A) .....	21
Section 8(a)(3) .....	30
House Committee on Education and Labor, Labor- Management Relation Act, 1947, H. R. Rept. 245, 80th Congress, First Session, 18 (1947) .....	21
H. R. Report No. 245, 80th Congress, 1st Session 18 (1947) .....	26
H. R. Report No. 510, 80th Congress, 1st Session 1138	26
Norris-La Guardia Act .....	27, 30
Sherman Act .....	27
Clayton Act .....	27
Taft-Hartley Act .....	27
67 Yale Law Journal 98, 102, Note 19 .....	30
Labor-Management Reporting and Disclosure Act	27



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1967

---

No. 309

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED  
STATES AND CANADA, *et al.*,  
Petitioners,  
*vs.*  
JOSEPH CARROLL, *et al.*,  
Respondents.

---

No. 310

JOSEPH CARROLL, *et al.*,  
Petitioners.  
*vs.*  
AMERICAN FEDERATION OF MUSICIANS OF THE UNITED  
STATES AND CANADA, *et al.*,  
Respondents.

---

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT

---

**CROSS-PETITIONERS' (PLAINTIFFS')  
PETITION FOR REHEARING**

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of the undersigned petitioners, Ben Cutler,  
Joseph Carroll, Marty Levitt and Charles Peterson, re-  
spectfully shows:

I. Petitioners were plaintiffs below and cross-petitioners  
in No. 310 October Term, 1967.



II. We petition for rehearing because the decisions dated May 20, 1968 in No. 309 and No. 310 October Term, 1967, are seriously erroneous on a number of crucial facts which are uncontradicted in the record; and because said decisions, especially the majority decision, demonstrate that this Court was grievously misled by the Union briefs and by the opinions of the courts below.

III. (1) Both the majority and minority opinions, apparently misled by Judge Friendly's dissent below, affirm and assume that, in the music industry,

- (a) petitioners as leader-employers charge prices which represent "almost entirely the scale wages of sidemen", the leader's fee and the 8% surcharge; and
- (b) the Union-established minimum prices represent "almost entirely" the wages of sidemen, the leader's fee and the 8% surcharge.

Nothing in the record warrants these grossly erroneous assumptions.

Here, for example, is a break-down of the minimum price, fixed by Local 802, for any leader-employer (like plaintiffs below) who books an engagement in Chicago, Illinois, to be performed by five musicians (including the leader) for a Wednesday Debutante party (10:00 p.m. to 3:00 a.m.), continuous music—all computed at Union price and wages:

1) Wages of 4 employee musicians (4 x \$71)	\$ 284.00
2) Leader's fee (2 x \$71)	142.00
3) Mileage fee for employees (4 x \$67)	268.00
4) Mileage fee for leader	67.00
5) Airplane tickets (5 x \$92.00)	462.00
6) Cartage fee \$4 plus 1/2 fare for bass viol	50.20
7) Food (dinner, breakfast and lunch) (5 x \$9.00)	45.00

8) Lodging (5 x \$10.00) .....	50.00
9) Uniforms (5 x \$2.00) .....	10.00
10) Pension (for Chicago Local) \$6.00 .....	6.00
11) Taxis (5 x \$5.00) .....	25.00
12) 10% differential for employees:	
\$284 (item 1 above)	
269 (item 4 above)	
<hr/>	
\$553 (times 10%) ..	55.30
13) 10% differential for leader-employer	
\$142 (item 2 above)	
67 (item 4 above)	
<hr/>	
\$209 (times 10%) ..	20.90
<hr/>	
Total used as base for 8% surcharge ..	\$1,485.50
14) 8% surcharge (8% of \$1,485.50) .....	118.83
<hr/>	
15) UNION MINIMUM PRICE .....	\$1,604.33

Of the foregoing items, Nos. 2, 4, 5, 7, 8, 9, 10, 11, 13 and 14 go into the *leader-employer's* pocket, as part of the *price mandated by Union bylaws*:

2) .....	142.00 (leader's fee)
4) .....	67.00 (leader's mileage)
5) .....	92.40 (leader's plane fare)
7) .....	9.00 (food for leader)
8) .....	10.00 (lodging for leader)
9) .....	2.00 (leader's uniform)
10) .....	2.00 (leader's pensions)
11) .....	5.00 (taxi fare for leader)
12) .....	20.90 (10% differential for leader)
14) .....	118.83 (8% surcharge)

Total .. \$469.13 or slightly more than 29% of the Union minimum price.

The purely *wage* items in the foregoing computation are:

1) (Wages of sidemen) . . . .	\$284.00
3) (Mileage for sidemen) . .	268.00
6) (cartage) . . . . .	4.00
12) (10% wage differential)	55.20

Total . . . . .	\$611.20	or 38% of the Union price
-----------------	----------	------------------------------

Professional leaders frequently charge more than the Union minimum wage. Only leaders like plaintiffs do traveling engagements. "Leaders" who have no regular bands and no reputations are not invited across State lines.

If the band taken to Chicago comprises *ten* men (including the leader), the Local 802 price would be \$3,068.60. This includes an 8% surcharge of \$227.30; wages to sidemen of about \$1,400 or 46% of the Union minimum price; and Union-mandated employer income of \$578 or 19% of the Union minimum price.

If Cutler plays a dinner *without dancing* at Waldorf Astoria's Grand Ballroom, he is permitted by the Union to have 6 men in his orchestra, including himself. But if the dinner is *with dancing* in that same Ballroom, the Union insists on a minimum of 12 men in the band, including leader. The Union minimum price for dinner music with six men and without dancing would be \$191.70, 34% of which would be Mr. Cutler's minimum profit under Union bylaws. But the price for dinner *and dance music* (12 men) would be \$477.36 *at least*, under Union bylaws; and Mr. Cutler's income out of this price is 15.5% under said bylaws. There would be no 10% travel differential, no travel expenses and no mileage fees. But the purchaser of the music (the father of the debutante) would, under Union bylaws, have to pay \$285.66 *more for the dance music than for mere dinner music*. This represents a *price increase*, due to Union minimum-employment quotas, unilaterally fixed by Union officials, of more than 240%,

which the public must pay because of the impact of unilateral Union pricing policies on the market for musical services.

Had Judge Friendly made calculations like the foregoing from the Local 802 Price List-booklet, he would not have arrived at the easy assumptions by which he misled himself and this Court to the extent illustrated by the quotations set forth in footnote 1, below. Computations based on Union pricing rules would quickly show that all of the quotations in footnote 1 are seriously in error in one or

<sup>1</sup> "The prices are the total of (a) the minimum wage scales for sidemen, (b) a 'leader's fee' which is double the sideman's scale when four or more musicians comprise the orchestra and (c) an additional 8% to cover social security, unemployment insurance, and other expenses."

"The premise of the majority's conclusion was that the 'Price List' was disqualified for the exemption because its concern is 'prices' and not 'wages'. But this overlooks the necessity of inquiry beyond the form."

"As such the provisions of the 'Price List' establishing those floors are indistinguishable in their effect from the collective bargaining provisions in *Teamsters Union v. Oliver*, 358 U. S. 283, which we held governed not prices but the mandatory bargaining subject of wages."

"The price floors here serve the identical ends served by Article XXXII in *Oliver*."

"\* \* \* the Price List is therefore '... a direct and frontal attack upon a problem thought to threaten the maintenance of the basic wage structure \* \* \*' 358 U. S., at 294."

"In other words, the price of the product—here the price for an orchestra for a club-date—represents almost entirely the scale wages of the sidemen and the leader. Unlike most industries, except for the 8% charge, there are no other costs contributing to the price. Therefore, if leaders cut prices, inevitably wages must be cut."

"\* \* \* Similarly, the price-list requirement is brought within the labor exemption under the finding that the requirement is necessary to assure that scale wages will be paid to the sidemen and the leader."

"In this respect we agree with the view espoused by Judge Friendly in his dissent, 372 F. 2d, at 168-170.

We think also that the caterer and booking agent restrictions 'are at least as intimately bound up with the subject of wages,' *Oliver II*, *supra*, at 606, as the price floors."

more respects; and that, if this Court needed accurate fact statements as the point of departure for its legal conclusions, it did not have them. This Court's own inquiry never went beyond *form* to reach the substance and specifics of the Union pricing methods spelled out in the Local 802 "Price Lists".

(2) Petitioners (plaintiffs below) are professional, full-time leaders, who (as the Union attorney admitted on the oral argument) are *employers* and who never play as sidemen. They have established businesses with their own established clienteles and reputations. They do not "assume" (as the majority suggests) the role of "leader of the orchestra," as an actor assumes a role. They *live* their careers as leader-employers. They do not obtain sidemen after assuming the role of leader. They have teams of regular musician-employees and other groups of extra-musician-employees. In this respect, they operate exactly like employer-caterers and employer-restaurateurs, who have regular and extra employees, depending on need. Moreover, the number of employer-leaders, like plaintiffs, is small; but their small group performs more than half the engagements for which contracts are filed with the Union.<sup>2</sup> Had these simple facts been kept in mind—facts which are undisputed on the record—the majority would

---

<sup>2</sup> Judge Friendly refers to Defendant's Exhibit L, which shows that 6,589 of Local 802's 30,000 members acted as "leaders for club dates" during the period from April 31 to December 31, 1960. This Union exhibit demonstrates that 1.7% of all "leaders" (plaintiffs are in this group of 1.7 percent) have garnered 36.6% of all engagement contracts filed with Local 802; and that 4.9% of all of the leaders involved had garnered 52.4% of all such engagement contracts. Judge Friendly thought these figures do not show that professional leaders stand apart from the others. The feature that really makes them *stand apart* is not statistics but their *status* as *employer-businessmen*. The statistics do show, however, that a small number of professional leaders (the ones who would be called upon for travel across State lines) get more than 52 percent of all engagements.



not have been betrayed into the further serious errors listed in footnote 3 below.

Such factual errors are serious: because they agglomerate plaintiffs below with the marginal "orchestra leaders" who are primarily sidemen; of whom it can truthfully be said that they constitute a "labor group". Unlike plaintiffs, marginal leaders are largely *employee-musicians*, who occasionally *improvise* as "orchestra leaders". They are not full-time employers and businessmen as are plaintiffs.

It seems anomalous that plaintiffs and other full-time leader-employer-entrepreneurs do not constitute a *class*, but are nevertheless made to constitute a *labor group*! It is even more anomalous that, in the rationale of the majority, plaintiffs are indiscriminately included in the vague and ambiguous designation of "leaders" or "orchestra leaders", which necessarily includes the "spectrum" of which Judge Friendly wrote—a spectrum which embraces mostly (96%) employee-musicians who *occasion-*

---

<sup>3</sup> "The purchaser of the music, *e.g.*, the father of the bride, the chairman of the events, etc., arranges with a musician, or with a musician's booking agent, to provide an orchestra of a conductor and a given number of instrumentalists, or 'sidemen,' at a specified time and place. The musician in such cases assumes the role of 'leader' of the orchestra, obtains the 'sidemen' and attends to the bookkeeping and other details of the engagement."

"A musician performing 'club-dates' may perform in different capacities on the same day or during the same week, at times as leader and other times as subleader or sideman. The four respondents, however, are musicians who usually act as leaders and maintain offices and employ personnel to solicit engagements through advertising and personal contacts."

"\* \* \* part of the union prescribed 'leader's fee' is attributable to service rendered in either conducting or playing and part to the service rendered in selecting musicians, bookkeeping, etc."

Footnote 1 of the dissent indicates a further factual error. Plaintiffs were not—all four of them—expelled from the Union. Peterson and Carroll were punished with expulsion. Cutler and Levitt were not.

*ally* assume the role of "leader", as distinguished from plaintiffs who *always* function as leader-employers. Besides, professional leaders like plaintiffs (as the undisputed evidence shows) only rarely spend time selecting musicians. This they leave to their "contractors", who are also subleaders, i.e., "supervisors" within the meaning of the NLRA. Nor is the professional leader's workday, on the average, usually devoted to leading or conducting. It is for the most part spent in soliciting clients, negotiating contracts, arranging problems (Petitioner's main brief pp. 22-23; second paragraph of dissenting opinion).

(3) Some of the grossest and most critical factual errors in the majority and minority opinions suggest that plaintiffs, in particular, and professional leaders like them, in general, are likely to, or actually do, *undercut wages*, unless the Union is given the right to dictate minimum prices for the industry. *The Union presented no professional leader as a witness.* Plaintiffs brought 25 of them to the stand. Each of these testified, without contradiction, that he *always* pays the wage scale unilaterally imposed by the Union. Five booking agents, including the two largest in the United States, testified that there was no wage or price cutting by any leaders they serviced. The only witnesses who admitted wage cutting were two Union witnesses who generally performed as sidemen. (One of the two was a Union official at the time of the trial.) Two of the plaintiffs (Carroll and Peterson) have not been Union members for four years. During that time, they *always* paid Union wages, as their uncontradicted evidence shows. One plaintiff, only (Levitt), admitted undercutting the Union *price* on one steady engagement. But he stated without contradiction that he nevertheless always paid Union *wages*. Union price control in the musical industry is no more necessary than union price control in any other industry. Employee-union-members and union officials are the best enforcers of Union scales

in this and in all industries. Not a line of record evidence shows the need to protect Union wages by Union price-fixing, especially in view of the constant visitation of all performances by Union delegates.

Considerations such as these, though amply supported by uncontradicted record evidence, were completely disregarded by this Court, because it was misled as to the facts by the courts below. Petitioners were carelessly thrown, by those courts, into a heterogeneous class of "leaders", or "orchestra leaders" in general. The outstanding characteristics of that class—the *occasionalness* of service as "*employers*" by members thereof and the *usualness* of their service as *sidemen*—were inaccurately attributed to plaintiffs, who never serve as sidemen and who are always full-time, true employers. Had this indiscriminate lumping of petitioners with the vast majority of "leaders" (who are primarily *sidemen*) not occurred, errors contained in the quotations gathered in footnote 4 would not have been committed.\*

---

\* "The 'Price List' establishes only a minimum charge; there is no attempt to set a maximum. Nor does the union attempt by its minimum charge to assure the leader a profit above the fair value of his labor services. The District Court found no evidence 'which indicates that the increment to the [leader] is unrelated to his costs in that function'. 241 F. Supp., at 841. See also 372 F. 2d, at 170 (Friendly, J., dissenting): 'A different result might be warranted if the floor were set so high as to cover not merely compensation for the additional services rendered by a leader but entrepreneurial profit as well. But there has been no such showing here.'"

"If the union may not require that the full-time leader charge the purchaser of the music an amount sufficient to compensate him for the time he spends selecting musicians and performing the other musical functions involved in leading, the full-time leader may compete with other union members who seek the same jobs through price differentiation in the product market based on differences in a labor standard:

"The union thus has a right to see that the petitioner does not perform that work for less than the going scale for union musicians and subleaders."

(Footnote continued on following page)

(4) As Justice Fortas indicated almost at the beginning of the oral arguments in these cases, the question whether *plaintiffs* are *employers* is crucial in this case. The evidence that they are employers is massive and uncontradicted in the record. It was conceded by the Union attorney during oral argument. It was found by the NLRB and by its Examiners in the following cases:

- 1) *Associated Musicians, Local 802 and Charles Peterson and National Association of Orchestra Leaders*, 171 NLRB No. 149 (which finds that petitioner-plaintiff Peterson is an employer).

(Footnote continued from preceding page)

"The critical inquiry is whether the price floors in actuality operate to protect the wages of the subleader and sidemen. The District Court found that the price floors were expressly designed to and did function as a protection of sidemen's and subleaders' wage scales against the job and wage competition of the leaders."

"Thus the price floors, including the minimums for leaders, are simply a means for coping with the job and wage competition of the leaders to protect the wage scales of musicians \* \* \*."

"That regulation is also justified as a means of preserving the scale of the sidemen and subleaders. There was evidence that when the leader does not collect from the purchaser of the music an amount sufficient to make up the total of his out-of-pocket expenses, including the sum of his wage-scale wages and the scale wages of the sidemen, he will, in fact, not pay the sidemen the prescribed scale. The District Court found:

'It is unquestionably true that skimping on the part of the person who sets up the engagement [the leader] so that his costs are not covered is likely to have an adverse effect on the fees paid to the participating musicians.' \* \* \*"

It will be noted that in the quotations *supra*, the majority makes a transition from a *labor contract* which *in form* not *in substance* (in actuality) fixes *prices* (such as was encountered in the *Oliver* case) to a *union bylaw* which *in form and in actuality* here imposes upon a whole industry a universal, unilaterally imposed pricing system to protect *employers* from competition and allegedly to protect union wage scales also unilaterally imposed. Such a transition is, it is respectfully submitted, logically and jurisprudentially indefensible under the complex of labor and antitrust legislation which deserves consideration and application here. The AFM price-list booklets fix prices both in form and in undeniable actuality!



- 2) *Carroll v. AFM*, 372 F. 2d 155 (C. A. 2) (which held that petitioner-plaintiff Carroll is an employer).
- 3) *Associated Musicians, Local 802 and Ben Cutler*, 164 NLRB No. 8 (which held that petitioner-plaintiff Cutler is an employer).
- 4) *Marty Levitt and AFM and Local 802*, 171 NLRB No. 94

See also: *Bartels v. Birmingham*, 332 U. S. 126; *Carroll v. AFM*, 294 F. 2d 484 (2nd Cir. 1961); *Carroll v. Associated Musicians of Greater New York*, 284 F. 2d 91 (2nd Cir. 1960); affirming 183 F. Supp. 636; *Cutler v. AFM*, 316 F. 2d 546, cert. denied 375 U. S. 941; *Schwartz v. Associated Musicians*, 340 F. 2d 222 (2nd Cir. 1963); *Cutler v. United States* (Court of Claims), 180 F. 2d 360.

There was no finding on this point by the Trial Court and no ruling by this Court. It would have been both anomalous and self-contradictory to place—for the first time in American jurisprudence—veritable *employers* in a “labor group”! This was nevertheless, done, despite plaintiffs’ indisputable status as *employers*. Neither fact nor principle justifies this aberration. Under our labor laws, there is no logical justification for the transition from “labor group” to the “leader’s labor service” or to “labor group work”, such as the majority and dissenting opinions effected. If a person is an *employer*, or a “supervisor” as defined in the NLRA, he simply has no place in the union which has organized his employees. No amount of rationalization with judge-made concepts like “labor group” or “labor group work” or “leader’s labor service” can obscure the clear, express intention of Congress to exclude *employers, supervisors and independent contractors* from unionization (here tolerated by this Court in spite of the realities behind the *Los Angeles Meat Drivers* case, 371 U. S. 94).



Nor is there any economic or legal justification for the analysis and partitioning of employer function undertaken, expressly or implicitly, by the opinions here. In no other industry or case were the functions of the employer split into "labor group work" and non-labor group work; or into an employer's "labor service" and his non-labor service.

That process, begun here, can have far-reaching effects. Unions and courts will now scrutinize the chores performed by *employers*, to learn whether they are quasi-employers (i.e., the anomalous *employers* to be placed wholly or partially in "labor groups") or the genuine employers (to be classified outside any "labor group"). On such artificial classification now depends an overweening "union interest": to force real *employers* into unions with their own employees and supervisors, to fix minimum prices for an entire industry and to fix wage scales without collective bargaining. Until now, we would have thought that merely to mention the possible consequences of such a principle would be argument enough to condemn it. Surely such a "principle" was enunciated "without full awareness of the implications and the likely consequences"!

(5) Stripped of its gloss of rationalization, the majority opinion stands unmistakably for the following revolutionary proposition:

Unions have the right, under our antitrust laws, to fix and enforce, unilaterally, minimum prices for an entire industry, *provided* they do so to protect wage scales which they impose without collective bargaining!

If there is a more disturbing and unusual principle in the whole range of labor law or antitrust law, we cannot conceive it. It can and surely will lead to widespread, if not universal, union *price* fixing—in the utter absence of statutory warrant.

(6) Despite our labor statutes, the rule of the majority inordinately expands the concept of "union interest" in such a drastic fashion that now unions have an "interest" to force employers and supervisors into union membership in the same labor organization which has organized the employers' employees; *provided* that the chores performed by the involved employers include items which have been or can be performed by union members; or which the courts wish to denominate as employers' "labor service" or employers' "labor group work"; or which fall within "union interest". This sort of surgery, perpetrated upon the *employers'* function and performance, desecrates the integrity of the employer's function and status. With the scalpel of rationalization, it dissects the employer into two parts—the entrepreneurial part and the "labor group" part—to ascertain whether he should be placed in a "labor group" or not. Let him be discovered to have only a small ingredient of "labor group work" in his employer performance, and he is relegated to a "labor group". Union interest in *fixing prices* is thus traceable to the fact that the employer has not surrendered as much work (including his *own*) as the employer can surrender to employees who are union members. This is more judicial will than legal reason. The architect, engineer, jeweler, chemist, lawyer, orchestra leader, shopkeeper or executive who does any work resembling what is actually *or potentially* done by union members in each of the involved areas of work is now subject to forced union membership, union price fixing, etc., despite his status as *employer*. Union men want some of the work he performs!

Or else, only employers in the music industry are discriminatorily subjected to this sort of union demand, union processing and judicial dissection. A leader like plaintiffs provides jobs for union members. That is not enough. He must do this with such abandon as to *deprive himself of some of his own job*—namely, the job

of acting as a full-time employer in his industry *typically* acts. All employer-leaders in the industry rose to employer status by, among other things, playing an instrument and by playing it *in the unique manner required for leading*. This they must give up if they wish to avoid enforced unionization!

In the various industries, employers perform different chores. They are allowed to remain employers and outside unions in all other industries when they do what employers in their industries typically or characteristically do. But not in the music industry. Here, they suddenly lose such *employer* status, even when they act as typical leader-employers *must* and *do* act to preserve their businesses. It is more important to protect unlawfully imposed wage scales unilaterally dictated by the Union, than to protect the employer's work, which provides jobs! Congress and the NLRB say that *employer status* is the crucial difference. This Court now says there are other *differentiae*, born of a diffuse and literally unlimited criterion taken from the *dictum* in the last paragraph of the *Los Angeles Meat Drivers* case.

The fallacy and unfactuality, from the point of view of economic theory and practice, of the Court of Appeals' reasoning as quoted with approval by the majority of this Court (p. 8, Slip Opinion) becomes apparent when the principle is generalized so as to apply to all employer-businessmen:

Where the employer-businessman performs work which an employee, who is a union member, does or could perform, the services of such employee would not be needed and the employer in this way saves wages he would otherwise have to pay. Therefore [this is the suppressed conclusion], the employer should not be allowed to perform such services and thus save wages; but should be required to hire an employee to do what leader-employers typically and always do; or the union involved should, in the al-

ternative, have the right and the "interest" to enlist or coerce said employer into union membership, to regulate his prices and regiment his business!

What has just been stated is no caricature. It accurately spells out the rule of antitrust and labor law stated by the Court of Appeals and approved by this Court in its decision of May 20, 1968. If there be any doubt upon that score, the following language from the majority opinion dispels it: "Thus the price floors, including the minimum for leaders, are simply a means for coping with the job and wage competition of the leaders to protect the wage scales of musicians who, respondents concede, are employees on club dates, namely sidemen and subleaders."

As long as unions fix price floors simply as a means "for coping with job and wage competition" (which it is now as easy to prove as to allege) with *employer-businessmen* in order to "protect the wage scales" *unilaterally imposed by unions*, the union has the legal right, under the anti-trust laws, to fix such price floors. This is the furthest extreme of union license under antitrust laws which this Court has ever approved. It is respectfully submitted that it is an extreme which challenges the whole jurisprudence of antitrust law legislation and aggrandizes the already over-stuffed powers of union leaders.

The quotation just made speaks of "the job and wage competition of the leaders," apparently referring once more to the *generality of "leaders"*, of whom it may indeed be said that they are in job and wage competition with union members *because the generality of "leaders" are regularly and primarily sidemen*. But that reasoning has absolutely no application to petitioners who are, in every legal and factual sense, full-time leader-employers. In no sense approved by economic realism can it be said that *employers* are in "job and wage competition" with their employees or with sidemen in general. And subleaders, as "supervisors" within the meaning of the



NLRA, have no right to be in the same union which has organized petitioners' employees.<sup>5</sup> Petitioners who have invested their lives, their efforts and their savings in their businesses and in their functions and status as leader-employers, are shocked at this Court's discrimination against them; and more shocked at judicial subjection of *all employers* to such unlimited "union interest" on the basis of "labor group work" or "labor service". This highly synthetic and unrealistic construction submits to unionization and union price dictation *all employers*; because all employers (except possibly the lazy ones and corporate entities as such) do some routine employer work which union members can do; and which union lawyers can henceforth call "labor service" or "labor group work", in order to assert "union interest."

(7) In effect, this Court by its majority opinion has scrapped the *Allen-Bradley* rule. At the very least that rule has been embroidered with patterns of "labor group work" which confusingly blur the distinction between employer and employee (to the further distension of the power of labor union leaders). Until now that distinction has been relatively easy in labor law and antitrust law. It is now withered by "union interest", despite uncontradicted record facts and the ordinary realities of industrial and economic life.

---

<sup>5</sup> Throughout these cases there has always been judicial failure to recognize the fact that a subleader is a *supervisor* within the meaning of the National Labor Relations Act, as amended. This is a point which Trial Examiner Boyd Leedom (formerly Board Member) did not fail to note in his recent decision (TXD-324-68 N. Y., N. Y., dated May 29, 1968 in cases no. 2-CB-4489-1, 2 CB 4494, 2 CB-4489-2, 2 CB-4489-3, 2 CB-4495, 2-CA-11264, 2-CA-11265). On page 4 of his decision, Mr. Leedom wrote: "Eddie Cardelli [petitioner] Carroll's contractor, that is, his hiring agent and supervisor within the meaning of the Act, as I find and conclude, had employed, in behalf of Carroll, musicians Frank Miller, Lawrence Arthur and Herbert Bass to play in one of Carroll's musical organizations organized weeks in advance for an engagement at the Waldorf Astoria Hotel in New York City on March 6, 1967."



(8) Some of the more important facts which emerge, uncontradicted, from the record concern the union *combination* with *non-labor groups* in these cases. Yet they are facts which this Court apparently overlooked, because it was misled by Judge Friendly's dissent and by the Union briefs. AFM and its Locals sign "labor contracts", for example, with hotels, night clubs, gambling casinos and restaurants. But these "labor contracts" fix labor standards and wages, not just for the rare or usually non-existent employees of the involved hotels, night clubs, casinos and restaurants, but for leader-employers like plaintiffs and for their sidemen and subleaders *when they perform in such establishments*. The professional orchestra-leader-employer who brings his orchestra to such establishments must, therefore, submit to a labor contract which he never negotiated, and which is imposed upon him by the contracting parties. Also as a result of such "labor contracts" and of union bylaws, he must use a "Form B" contract, by which he is forced to acknowledge that he is *not* an employer; and that his "employer" is the purchaser of the music; i.e., the guest or lessee of the involved hotel, nightclub or restaurant, with whom he signed the engagement contract dictated by the AFM. If the leader-employer refuses to sign, his orchestra will not be permitted by the Union to work. If the hotel, nightclub, casino or restaurant permits such a dissident leader-employer to perform on its premises or itself refuses to sign the Form B contract (on the valid ground that it has no musician employees), the establishment is struck or put on the Unfair List. See in this connection, the decision of the NLRB in *Reno Musicians Protective Union, Local 368 and Foster S. Edwards, et al.*, 170 NLRB No. 56, where all this occurred recently.

(9) This Court (footnote 6, majority opinion) deemed "vital" the distinction between "the kinds of single engagements". It then proceeded to demonstrate how it

was misled as to the vital facts. It stated that "the 'non-club date' engagements are ordinarily governed by collective bargaining agreements . . . the same is usually true of the steady engagement field". The fact is that by far the largest number of "non-club date" engagements is booked by professional orchestra-leader-employers like plaintiffs. The same is true of the vast majority of steady engagements. They are *not* covered by collective agreements; because neither AFM nor any of its locals has ever concluded a labor contract with any leader-employer. Thus, the vast majority of "non-club date" engagements and of steady engagements is *never* moderated by collective bargaining because of the manner in which the Union asserts its monopoly power. This is uncontradicted on the record. In a matter of fact regarded as "vital", the majority of this Court was, therefore, misled into gross error.

(10) Another unsound corollary implicit in this Court's ruling on these cases yields to courts and unions the right to probe into questions like: (i) whether the minimum prices fixed by unions for an entire industry include margins above labor costs which are "reasonable"; (ii) whether the *employer* collects (from his customer) "an amount which is 'unrelated to his costs in that function'"; (iii) whether the *employer* collects from his customer "an amount sufficient to make up the total of his out-of-pocket expenses"; (iv) whether the leader-employer charges an "amount sufficient to compensate him" for personally performing employer functions! Indeed the dissenting opinion seems to apply a prevailing-rate-of-wages concept to union pricing: prices may not be "less than the *going scale* for union musicians and subleaders" (emphasis added). Surely, such inquiry by the courts and such price-fixing by unions was never intended by any Congress in American history. Nor is such probing appropriate for courts or for the economy of our country. These are

economic, political and legislative matters, better left to Congress or to legislation by the States.

(11) If to-day the Court grants "union immunity for regulation of those activities of bandleaders which *sufficiently* affect union members," where will this thrust end its impact upon the American economy? If there is to be equal protection of the laws, unions will demand and receive immunity for regulation of *all* employer activities (including pricing) which, in the opinion of union leaders, "sufficiently affect union members". This is judicial legislation run riot, providing a new and slippery standard for union or judicial appraisal of labor and antitrust conduct.

(12) In footnote No. 8 of the majority opinion appears the following language:

"The Court of Appeals also found 'no evidence of a conspiracy between Local 802, or the Federation, and orchestra leaders to culminate competitors, fix prices or achieve any other commercial restraint, nor was such a finding made by the district judge. Rather, the record establishes that all restraints were instituted *unilaterally* by the unions and acquiesced in by the orchestra leaders.' 372 F. 2d, at 164; see 241 F. Supp., at 891."

Petitioners respectfully submit that the evidence of such combination or conspiracy between defendant Unions and many employers (in the "non-labor group") is overwhelming, and uncontradicted in the record; and that the courts below erred grievously in this respect. Nor, in legal principle or in reason, should it matter whether the restraints in question were "instituted unilaterally" or "acquiesced in" by leader-employers. In any event, enforcement of the restraints (no matter who *originated* them) was definitely and indisputably in combination with booking

agents, leader-employers, hotels, nightclubs, caterers and many others. If it be true (as the dissent suggests in its footnote No. 9) that this Court did *not* intend "to hold that unilateral demands, enforced by threats, combined with willing coöperation or relevant acquiescence by leaders . . . cannot amount to a combination in restraint of trade", the uncontradicted testimony and documents in this record establish such a combination here beyond reasonable doubt.

Despite the mass of uncontradicted and indisputable evidence in the record, the glaring fact of such combination was neglected below and here; or it was rationalized out of sight: (i) by splitting the combination into components ("instituted unilaterally by the unions" and "acquiesced in by the orchestra leaders") which unmistakably spell out combination; or (ii) by conveniently dubbing full-time orchestra-leader-employers and entrepreneurs as members of a "labor group", because they were guilty of performing "labor group work" of a type invariably performed by all professional leader-employers. Actually, the plaintiffs did what any and all employers in the music industry regularly and typically do; and acting in that way should not disparage their *employer* status. How an *employer* can belong to a "labor group" is not explained, except by partitioning the functions of leader-employers; although no court or board has ever dreamed of such splitting of employer functions in any other industry, where the only and simple inquiry was whether the alleged employer is really such. Applying to leader-employers the tests applicable to employers in other industries, there can be no doubt about plaintiffs status as employers. Even Judge Levet saw this in other cases involving the same plaintiffs: *Cutler v. Musicians*, 211 F. Supp. 433; *Carroll v. Musicians*, 206 F. Supp. 462.

Legislative developments after the *Lake Valley* case raised serious questions about the vitality of that case, which was certainly limited in *Hinton v. Columbia River Packers Association*, 117 Fed. 2d 310, 313 (Ninth Circuit,



1941), reversed 315 U. S. 143, 147 (1942). The Taft Hartley Amendments were obviously intended to limit the situations in which independent contractors could be characterized as employees. Section 2(3) National Labor Relations Act, 61 Stat. 137 (1947), 21 U.S.C. § 152 (3) (1958) amending 49 Stat. 450 (1935); House Committee on Education and Labor, Labor-Management Relations Act, 1947, H. R. Rept. 245, 80th Congress, First Session, 18 (1947); *NLRB v. Steinberg*, 182 F. 2d 850 (CA 5, 1950).

Furthermore, § 8 (b) (4) (A), added by 61 Stat. 140 (1947), 29 U.S.C. § 158 (b) (4) (A) (1958), as amended, 29 U.S.C. § 158 (b) (4) (A) clearly reinforces § 2(3) NLRA by proscribing union pressures to force *self-employed persons* to join unions. Congress also forbade "supervisors" from being members of rank-and-file unions. It forbade, *a fortiori*, *employers* from being members of the same unions which organize their employees. Under these circumstances, there is no statutory warrant for this Court in antitrust cases to expand the "labor group" or to construe the Norris-La Guardia Act as if the NLRA did not exist.

(12) The dissent correctly paraphrases one aspect of this Court's ruling in this case as follows:

"Unions are, of course, not without interest in the prices at which employers sell. As the majority points out, by seeing that employers sell at prices covering all their costs, a union can insure employer solvency and make more certain employee collection of wages owed them. In addition, assuring that competing employers charge at least a minimum price prevents price competition from exerting downward pressure on wages."

In no other industry has union "interest in the prices at which *employers* sell" been used as justification for



union price-setting. In none have unions been allowed to oversee *employer* prices to "insure employer solvency." Throughout the opinions in this case, the status of plaintiffs as genuine employers has been implicitly denied (despite footnote 7 of the majority opinion). A prime example of such implicit denial appears from the quotation just made whose rationale (if applied to all genuine employers in all industries) could effect an economic revolution of country-wide dimensions. To assure that "competing employers charge at least a minimum price" and in order to aid unions in preventing "price competition . . . exerting downward pressure on wages" means to convert the government of the economic sector into a labor government and to attach to our antitrust laws a gloss which contradicts every relevant expression of legislative intent to be found in our labor law and antitrust law. It means that the area of "legitimate union interest in the prices at which employers sell" is left without any confining barrier except what union self-discipline imposes or what the courts come up with, by way of price regulation which no statute authorizes and which both statutes and cases reprobate.

Petitioners, therefore, in the light of the computations of prices made by them daily as leader-employers (computations never, apparently, considered by any court in these cases, although they are implicit in the Union Price-List booklets) are appalled by the fact that this Court's majority was not impeded from its revolutionary ruling here by Justice White's warning:

" . . . a significant aid to satisfactory resource allocation and a deterrent to inflation, would be substantially diminished if industry-wide unions were free to dictate uniform prices through agreements with employers. I have always thought that this strong policy outweighed the legitimate union interests in the prices at which employers sell, and until today I had thought

that the Court agreed. Of course the lack of discussion of this question in the majority's opinion, and the failure to refer to the unanimous rejection in *Jewel Tea* of antitrust immunity for union efforts to fix industry-wide prices, suggest that the Court takes this step without full awareness of the implications and the likely consequences. The step is nonetheless disturbing and I must record my dissent."

It is respectfully submitted that there was not only "lack of discussion" but inferential rejection of *Jewel Tea*; *Allen-Bradley*, *Los Angeles Meat Driver*, and the *Hinton* cases. This Court and the courts below were misled as to the Union pricing realities by the failure of the Trial Court to note, from the numerous executed Form B contracts introduced into evidence, the actually involved pricing computations. There was a failure to appreciate the potential of both opinions to embrace union pricing in all industries. For the sudden discovery of "labor group work", performed by *employers*, provides a conceptualism elastic enough to englobe all employers in all industries. There are no employers (except corporate entities) who do not at times perform what can be called (very loosely, since the terms are themselves semantically very loose) "employer's labor service" or "labor-group work." Every human *employer* daily does things, as such, which union members can do or do. Only *corporations* like the Stephen Scott Organization and like Charles Peterson Theatrical Productions, Inc., fit into the artificial category of orchestra "leaders who never personally lead", in the following sentence taken from the dissenting opinion:

"The musicians union imposes its rules not only on petitioners, who sometimes lead and sometimes hire subleaders, but upon leaders who never lead personally. These leaders are merely independent businessmen, performing no 'labor group' work and the union has no proper interest in regulating their activities."

This is like saying: "Unions impose rules on bosses (employers) who sometimes do the bossing and sometimes hire supervisors to do it for them." What right, under statute or under a justifiable labor or antitrust jurisprudence, does the *union* have to make rules for genuine *employers* (plaintiffs) and genuine *supervisors* (sub-leaders)?

The quotation just made is also like saying that an active orchestra leader cannot be an employer; that a reputed leader cannot lead by hand, by baton or by playing an instrument, without subjecting himself to "legitimate union interest." It is like saying an architect can't be an employer unless he stays away from the drafting board; that a jeweler can't be an employer unless he handles no jewels or customers; that a chemist can't be an employer except when he fingers no test tubes; that a shop-keeper cannot be an employer unless he refuses to deal with customers; that an executive cannot be an employer under the NLRA unless he takes care not to perform an employer function which actually or potentially can be discharged by union members, actual or potential! Where does it all end? The only real employers, insulated from "legitimate union interest" under the rule in these cases, are legal personalities—*corporations* and retired bosses *who do not work as such*. There never was a more sweeping development under the law of master and servant!

Is nothing whatever to be said in favor of the *right of an employer to work as such*? Must the union juggernaut roll over this right, too—a right which is creative, which provides the initiative in all industry, and which opens the gateway of opportunity to union members who want to better themselves?

(13) We can do no better, in dealing with this point in our petition than to refer to the dissent (pp. 8-9, Slip Opinion). We do so with two observations. We realize that it was already considered by the majority—but not in

the context of the corrections of factual errors made in this petition. Moreover, we apply the quotation to plaintiffs and to all professional orchestra leaders, who are *genuine employers*, regardless of the irrelevant and spurious concept of an *employer's* "labor group work", which is allowed to submerge *employer status*.

Justice White mentions only *five* commercial restraints imposed by the union. The record, especially the AFM bylaws, show dozens of them. Indeed, many AFM bylaws exclusively regulate the entrepreneurial activities of orchestra-leader-employers.

(13) The Trial Court not only dismissed the complaint but awarded costs to defendants. This Court affirmed the judgment of the District Court "in its entirety." In a case where defendants committed so many illegalities and where so much is to be said validly for plaintiffs' contentions, the award of costs seems to petitioners to be grossly unfair. Since, under Rule 54 (d) F.R.C.P., the award of costs is discretionary, petitioners respectfully submit that, at the very least, no costs should be allowed against them in this 8-year-old litigation by which they fought against union power and wealth to vindicate their ordinary rights as *employers*. The Second Circuit refused to allow costs; and even Judge Friendly, on dissent, made no mention of costs. See *Arabian American Oil Company v. Farmer*, 379 U. S. 227. Plaintiffs have spent their life savings in seeking justice against Unions which derived most of their income from leader-employers like plaintiffs.

(14) The majority of this court agreed with Judges Friendly and Anderson that leaders may be pressured into AFM Unions. Petitioners contend that such pressure is a predatory practice and a violation of the Sherman Act. In the present state of AFM bylaws and practice, no organized sideman or subleader is allowed to perform with or for an orchestra led by a nonunion member. If a leader



wants to work, he is obliged to pay dues and adhere to union regulation. Section 2 (3) of the National Labor Relations Act explicitly excludes independent contractors from the definition of employee; *a fortiori* employers are excluded. Congress has indicated that this provision was intended to bar union membership of independent contractors. (H. R. Report #245, 80 Congress, 1st Session 18 (1947); H. R. Report Rep. #510, 80 Congress, 1st Session 1138.) Section 14(a) provides that nothing in the Act prohibits supervisors from becoming or remaining members of a labor organization which is *different* from the organization which has organized the rank and file workers. The absence from the Act of a similar proviso for independent contractors can be interpreted as a prohibition of union membership for independent contractors under the rule *expressio unius est exclusio alterius*. Section 8 (b) (4) (A) makes it an unfair labor practice to pressure or coerce self-employed persons into a labor union. The NLRB regards a unit of employees and independent contractors inappropriate for collective bargaining and certification. *General Foods Corporation, Birds Eye Division*, 110 NLRB 1088 (1952); *Hampton Roads Broadcasting Corp.*, 98 NLRB 1090 (1952).

(15) The very manner in which the majority framed the question to which it addressed itself fails fairly to state the issues raised by petitioners. Those issues did *not* affect "orchestra leaders" as a generality, but only *petitioners and other professional leader-employers* who constitute a very small, homogeneous, unique and established genre of orchestra leaders. It is perhaps impossible to include within the compass of a single question the numerous comprehensive legal issues involved. But the following is a more accurate *status quaestionis* than the one which seems to have misled this Court: Whether certain specific practices and bylaws of AFM and its locals, which are enforced against plaintiffs, as Union members and as full-time *employers* and businessmen, violate the Sherman



Act as activities in combination with non-labor groups (including other leader-employers, who are Union members) or are exempted from the antitrust laws by the Norris La Guardia Act construed in the context of the Sherman Act, the Clayton Act, the NLRA, the Taft-Hartley Act and the Labor-Management Reporting and Disclosure Act?

Section 4(b) of the Norris Laguardia Act forbids injunctions against becoming or remaining a member of a labor organization only in *labor disputes*. There is no labor dispute within the meaning of that Act between petitioners and the AFM, its various locals or their members. The courts have read this section of the Norris Laguardia Act as if it did not cover concerted activities of self-employed workers, to say nothing of concerted activities of employers. *Columbia River Co. v. Hinton*, 315 U. S. 143 (1941). The Norris-LaGuardia Act and the Clayton Act, said this case, applied only when an employer-employee relationship was at the "matrix of the controversy" (315 U. S. 143, 147). The matrix of the present controversy is not a "labor dispute" but *price-fixing* by the Unions in combination with non-labor groups. The *Hinton* doctrine has been applied to situations in which independent contractors combined to fix compensation for work and labor, even though no tangible commodity was exchanged. *American Medical Association v. United States*, 317 U. S. 519 (1942); *United States v. National Association of Real Estate Boards*, 339 U. S. 485 (1950); *Taylor v. Local 7, International Brotherhood of Journeymen Horseshoers*, 352 F. 2d 593 (4th Circuit 1965), certiorari denied, 384 U. S. 967 (1965); *Gulf Coast Shrimpers and Oysters Association v. United States*, 230 F. 2d 658 (5th Circuit 1956), certiorari denied, 352 U. S. 927, rehearing denied 352 U. S. 1099 (1957).

Justice Stewart, writing for the Court in the *Grease Peddlers'* case held that injunction against future affiliation of grease peddlers with the union was proper. He did not refute the union's contention that peddlers were

economically disadvantaged and could benefit by union affiliation. He did not deny that the union would be a much stronger collective bargaining force if it had organized all workers in the grease trade. The court focused attention on an unrealistic stipulation that there was an utter lack of job and wage competition between the peddlers and the employee grease collectors. Justice Goldberg repeated Justice Stewart's job and wage or economic interrelationships test; but he failed to refute the argument that permitting peddlers to join the union would make the union a stronger collective bargaining force. It would seem therefore that the phrase "economic interrelationship" means nothing more than job and wage competition. Otherwise it is so vague and amorphous as to be either meaningless or altogether too inclusive.

Judge Friendly's argument that Local 802 had the right to fix the *wages* "of orchestra leaders" [Employers do not receive *wages*!] because it has an "interest" to see that they are compensated for undertaking the exacting job of orchestra leader is plainly wrong. Leader-employers gain many anticompetitive advantages from unionization that would not otherwise be available to them. The 10% traveling surcharge and its successor the 10% traveling wage differential (which Local 802 leaders must now charge to purchasers of music) and the various other union rules which insulate the local single engagement and steady engagement market from outside competition accrue to the advantage of Local 802 bandleaders. Under *Hinton* those bandleaders would not be allowed to receive these benefits by combining among themselves. Neither this Court nor Judge Anderson below has explained why leaders-employers should be allowed to receive these benefits through unionization.

Judge Levet's conclusions which this Court reinstated are erroneous even if his major premise (that leaders, unless union-regulated, will adversely affect employment

of union members) is accepted. The foundation for Judge Levet's opinion is his "labor group" test: and the same test is the foundation of this Court's majority opinion. The facts out of which the labor group test originated showed the unsoundness of this Court's and Judge Levet's use thereof. The "labor group" test grew out of the effort of many employers to escape collective bargaining and to avoid the burdens of federal and state employment taxes. Such employers began operating their business with self-employed persons or independent contractors rather than with *employees* because in that way they could obviate expenses imposed by statute. Many working men welcomed this device. The former employee now drove his own truck or operated his own sewing machine. He was his own boss, an alleged independent business man, an entrepreneur. He, nevertheless, performed the same chores as before. But petitioners as leaders and as employer-businessmen function very differently from employee-musicians. Even as orchestra *leaders*, they *led* their ensembles and their employees *followed* their leadership.

In time this Court acknowledged that the distinction between employees and independent contractors was often meaningless. Each group was sometimes threatened with employer exploitation. That exploitation resulted from the fact that the employer did not want collective bargaining and did not want to pay the employment taxes and assume the other responsibilities of employer. In the instant cases, however, it is the *Union* that does not want collective bargaining, for which petitioners have begged for six years. It is the *Union* which wanted to shift the responsibilities of being an employer from the leader-employer to the purchaser of music, the least likely candidate for such responsibilities, as the taxing authorities quickly showed and as this Court itself acknowledged in *Bartels v. Birmingham*, 332 U. S. 126. See also *Cutler v. United States*, 180 F. 2d 360 (1950).

In *National Labor Relations Board v. Hearst Publications Co., Inc.*, 322 U. S. 111 (1944), this Court, while not relaxing the *Hinton* doctrine, broadened the definition of "employee." But in 1947, Congress overruled the *Hearst* case. For unions that meant that the employer was able to drive down the wages of unionized employees, because independent contractors, who were functionally indistinguishable from union-member employees, were willing to do the same work as union member for less money. Section 8(a)(3) NLRA makes it an unfair labor practice for an employer to replace workers with independent contractors, if the purpose of such conversion is to avoid obligations to bargain collectively. See Note, "*Employee bargaining powers under the Norris Laguardia Act; the independent contractor problem*", 67 Yale Law Journal 98, 102, note 19. This Court reacted to this situation in three cases: *Milk Wagon Drivers Union Local 753 v. Lake Valley Products, Inc.*; the *Oliver* case and the *Grease Peddlers* case. In all three of these cases the union wanted and had collective bargaining. In the instant cases, it is the Unions which do not want and do not have collective bargaining. They refuse to recognize leaders like petitioners as employers. They find it easier to impose wages, hours, working conditions and prices by means of bylaws than by dealing with the involved employers. In the *Milk Wagon Drivers* case, it was impossible to distinguish functionally those vendors who were allegedly independent contractors from the drivers employed by the dairy companies. Thus, the *Milk Wagon Drivers* case was written against the so called "peddler system" by which the employer sought to avoid collective bargaining and other responsibility as employer. In the instant cases, petitioners are the true employers and they simply want to be recognized as such. They have been shouldering all of the responsibilities of employers. According to the very language used by this Court "the vendor system was a scheme or device utilized for the purpose of escaping the payment



of union wages and the assumption of working conditions not commensurate with those imposed on the union standards." (311 U. S. 91, 98-99.) But petitioners here utilized no scheme or device to escape the payment of Union *wages*, which they always paid even though they were unilaterally and therefore unlawfully imposed. Petitioners also complied meticulously with union working conditions, as unilaterally prescribed in Union bylaws. At no time did they undercut any of the involved union standards even though these, too, were unilaterally imposed. There is not a dot of evidence in the record which even tends to suggest that any petitioner at any time undermined union wages, hours or working conditions. The Union briefs and other documents at no time even allege that this was done by any plaintiff below. In any event, the *Milk Wagon Drivers* case is entirely bare of any anticipation of a "labor group" definition or approach to labor relations. Justice Black who wrote the opinion for the Court deemed the so called peddlers *employees*; as did the contracting parties in their labor contracts. Moreover, the precise holding of the case was that picketing even as part of a campaign to organize alleged independent contractors (who were functionally indistinguishable from union-member employees) could not be enjoined. Thus, this Court did not decide whether the peddlers could or could not join the union or be represented by it. In the *Oliver* case the so called independent contractors delivered freight. In the *Grease Peddlers* case they delivered restaurant grease. But in other respects the facts and the union's position closely resembled the *Milk Wagon Drivers* case. The slight differences are not material here. In *Oliver* the issue was whether federal labor law preempted Ohio's Anti-trust statute. In the *Grease Peddlers* case the union did not contend that the peddlers displaced organized employees. Each of the three opinions does however suggest that if *self-employed workers* or so called *independent contractors* compete with union members they are a "labor group." There is noth-



ing in any of the three opinions which suggests that *employers* do or can constitute a "labor group." No statute or congressional report even intimates that Congress wanted employers and businessmen to affiliate with or be represented and regulated by a bona fide labor organization.

What the majority of this court has done here, in effect, is to attribute a different meaning to the word "labor" in the phrase, "labor group", from the meaning of the word "labor" in the phrase "labor dispute". The result is both anomalous and startling. The group that has the power, namely the Union, can easily sell exemption from antitrust laws or part of it to employers, conveniently placed in a "labor group" without the formalities of collective bargaining. That is like selling indulgences exempting people otherwise liable from punishment under the antitrust laws! Obviously if union officials enforced wage increases solely to assist orchestra leaders-employers to gain anticompetitive advantage, there would be violation of the Sherman Act. But such a wage increase could always be hidden under averments that the increase was justified because it benefited *employee* musicians.

(16) It is difficult to understand how a labor union could discharge a duty of fair representation to both employee-musician and employer-leaders artfully thrown into a "labor group". The duty of fair representation must be read from sections 8(b) and 9(a) NLRA, *National Labor Relations Board v. Miranda Fuel Louisville and Nashville Railroad Co.*, 323 U. S. 192 (1944). But these provisions apply only to *employees*. The Act specifically states that the word, "employee", does not include *self-employed persons*. Still less does it include employers like petitioners.

IV. No previous application for the relief herein sought has been made.

WHEREFORE, petitioners undersigned respectfully pray  
for a rehearing herein upon the grounds aforesaid.

New York, N. Y.

June 13, 1968

.....  
Ben Cutler

.....  
Joseph Carroll

.....  
Marty Levitt

.....  
Charles Peterson

### Verification

City, County and State of New York:

BEN CUTLER, JOSEPH CARROLL, CHARLES PETERSON and  
MARTY LEVITT, being duly sworn, say:

We are petitioners herein. The foregoing petition is true to our knowledge; and on the advice of our attorney, we believe that the law cited is valid and applicable; and our request for relief is just and meritorious and was not made for the purpose of delay or for any technical or insubstantial reason.

.....  
Ben Cutler

.....  
Joseph Carroll

.....  
Charles Peterson

.....  
Marty Levitt

Sworn to before me this  
14th day of June, 1968.

ANTHONY J. SHOVELSKI,  
Notary Public,  
State of New York.

No. 41-3648915.

Qualified in Queens County.

Commission Expires March 30, 1969.







SUPREME COURT, U. S.

FILED

OCT 2 1969

IN THE

Supreme Court of the United States

JOHN F. DAVIS, CLERK

October Term, 1967.

No. 309.

AMERICAN FEDERATION OF MUSICIANS OF THE  
UNITED STATES AND CANADA, *et al.*,

*Petitioners,*

*vs.*

JOSEPH CARROLL, *et al.*,

*Respondents.*

No. 310.

JOSEPH CARROLL, *et al.*,

*Petitioners,*

*vs.*

AMERICAN FEDERATION OF MUSICIANS OF THE  
UNITED STATES AND CANADA, *et al.*,

*Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT.

**Supplemental Cross-Petitioners' (Plaintiffs') Petition  
for Rehearing.**

GODFREY P. SCHMIDT,

*Attorney for Cross-Petitioners-Plain-  
tiffs,*

100 West 42nd Street,

New York, N. Y.

212 279-0355.

## Table of Contents.

	Page
Letter, Godfrey P. Schmidt, Dated September 23, 1968, to Hon. Earl Warren .....	1
Letters, Annexed to Foregoing Letter of Godfrey P. Schmidt .....	4
Injunction Order .....	6
Exhibit A, Annexed to Injunction Order .....	8
Exhibit B, Annexed to Injunction Order .....	10
Exhibit C, Annexed to Injunction Order .....	12



Letter, Godfrey P. Schmidt, Dated September 23,  
1968, to Hon. Earl Warren.

LAW OFFICES

GODFREY P. SCHMIDT

100 West 42nd Street

New York, N. Y. 10036

GODFREY P. SCHMIDT

ROBERT N. ROSE

JAMES McGRATTAN

ANTHONY J. SHOVELSKI

Washington D. C. Office  
1010 Vermont Ave., N. W.

Cable Address "Godofrede"

(212) 279-0355

September 23d, 1968.

Hon. Earl Warren

The Chief Justice of the United States  
Washington, D. C. 20543

Re: Nos. 309 and 310

October Term, 1967.

Dear Mr. Chief Justice:

In the above identified cases (from which your Honor has disqualified himself) there is pending before your Court a petition for rehearing, copy of which is here-with enclosed. The Office of the Clerk of the Court informed me that this petition will not be acted upon until October.

Within the last few days, I learned from three of the four plaintiffs-cross-petitioners whom I represent in these two antitrust cases (Messrs. Cutler, Carroll and Peterson) that they, respectively, received from Associated

*Letter, Godfrey P. Schmidt, Dated September 23, 1968,  
to Hon. Earl Warren*

Musicians of Greater New York, Local 802 (one of the two defendants-respondents) originals of the letters whose copies are herewith enclosed. Each of these three letters invites one of my said clients to bargain collectively with Local 802 respecting wages and other terms and conditions of employment of his employees.

I send these enclosures because they constitute conclusive answers to queries addressed by Associate Justices Fortas and Black, during the oral argument of the above identified cases, to the attorney for defendants:

"Are the plaintiffs [my clients] really employers?"

At first Mr. Rosenberg, for the defendants, conceded only for the purposes of argument that my clients are employers, in spite of that fact that he had earlier argued that my clients are "employees". Later in the oral argument, being pressed by Justice Black for a direct answer to the question quoted above, Mr. Rosenberg denied that the plaintiffs below were "really employers", erroneously characterizing the record evidence on this point as insufficient (despite the fact that the evidence on this matter is massive and undisputed in the record). This prompted Mr. Justice Black to ask why he had made the concession of employer status described above.

Now, by inviting my clients to negotiate labor contracts to cover their employees, Local 802 necessarily and by unmistakeable implication concedes that they are really employers. This simply reaffirms a similar concession, made after the trial of these antitrust cases in the form of a new contract form formulated by Local 802 and imposed by it upon all professional orchestra leaders (when they perform in its jurisdiction); whom the new contract form expressly designates as "Leader-Employers". A copy of that new form of contract prescribed



*Letter, Godfrey P. Schmidt, Dated September 23, 1968,  
to Hon. Earl Warren*

by Local 802 is herewith enclosed, as Exhibit C, attached to an injunction order of the Second Circuit Court of Appeals dated October 31st, 1967. Said injunction was, of course, predicated upon that Court's majority decision in 372 F. 2d 155.

The Local 802 concessions aforesaid, superimposed upon footnote 7 of the majority decision of your Court ("We need not decide the question.") and upon the queries by Associate Justices Fortas and Black, not only necessitate this letter but anachronistically render that footnote rather puzzling, if not altogether irrelevant. If, in fact and in law, my clients are *really* employers for all purposes, they cannot consistently be put in a "labor group" for antitrust purposes. Even if the recent concessions be considered as confined to NLRA purposes, fidelity to the interlacing interpretation theory forbids putting my clients in a "labor group".

My zeal diligently to represent my clients (who are so importantly affected in their rights and status as well as their professional activities by the majority decision) prompted me to call these two union concessions to the Court's attention; especially since two Associate Justices manifested probing interest in such concessions during the oral argument. It occurred to me that they and other Justices might be equally interested even now. Also, I deem it my duty to add these two union concessions to the list of other facts which, I respectfully submit, were evidently misapprehended by the majority, as I try to show in the petition for re-argument of these complicated and consequence-laden cases.

Therefore, if it be proper, I respectfully ask that a copy of this letter and its enclosures be given to the As-

4

*Letters, Annexed to Foregoing Letter of Godfrey P.  
Schmidt*

sociate Justices who will consider my clients' petition  
for rehearing.

Respectfully,

GODFREY P. SCHMIDT

cc. to:


Van Arkel & Kaiser, Esqs.  
1730 K Street, N. W.  
Washington, D. C. 20006

Emmanuel Dannel, Esq.  
3 East 54th Street  
New York, N. Y. 10022

GPS/h  
enc.

---

**Letters, Annexed to Foregoing Letter of Godfrey P.  
Schmidt.**

(See opposite page.) 

LOCAL  
**802**

A F of M  
Chartered August 27th, 1921



— AFFILIATED WITH A.F.L.-C.I.O. —

# Associated Musicians of Greater New York

261 WEST 52nd STREET, NEW YORK 19, N.Y.

PLaza 7-7722

## Officers

President  
MAX L. ARONS  
Vice-President  
AL KNOFF  
Secretary  
LOUIS CRITELLI  
Treasurer  
MY JAFFE

## Executive Board

VINCENT BADALE  
IRVING BLOOM  
SHERMAN BRANDE  
AL BROWN  
PATSY FASANELLA  
CLIFTON GLOVER  
WILLIAM M. POWERS  
VINCENT ROSSITTO  
EARL SHENDELL

## Trial Board

Chairman  
CHARLES S. SOLLINGER  
Clerk  
LOU RUSS  
FRANK GARISTO  
EDWARD MANNATU  
MARTY MELFI  
IRVING MINK  
VINCENT MOYNIHAN  
JERRY SERLY  
HENRY G. WALTON

REGISTERED MAIL  
RETURN RECEIPT REQUESTED

September 18, 1968

Mr. Ben Cutler  
1410 York Avenue  
New York, New York 10021

Dear Sir and Brother:

Please be advised that Local 802 designates Monday, September 30, 1968, - 3:00 P.M. in the Executive Board Room of Local 802, A. F. of M., 261 West 52nd Street, New York, N.Y. for the purpose of negotiating a contract with you for the employment of our members.

Fraternally yours,

*Louis Critelli*  
LOUIS CRITELLI, Secretary  
Local 802, A. F. of M.

*Patronize Live Music*

# 802

A F of M  
Chartered August 27th, 1921



AFFILIATED WITH A.F.L.-C.I.O.

## Associated Musicians of Greater New York

261 WEST 62nd STREET, NEW YORK 19, N.Y.

PLaza 7-7722

### Officers

President  
MAX L. ARONI  
Vice-President  
AL KNOPP  
Secretary  
LOUIS CRITELLI  
Treasurer  
MY JAFFE

### Executive Board

VINCENT BADALE  
IRVING BLOOM  
SHERMAN BRANDE  
AL BROWN  
PATSY FASANELLA  
CLIFTON GLOVER  
WILLIAM M. POWERS  
VINCENT ROSSITTO  
EARL SHENDELL

### Trial Board

Chairman  
CHARLES S. SOLLINGER  
Clerk  
LOU RUSS  
FRANK GARISTO  
EDWARD MANNATU  
MARTY MELFI  
IRVING MINK  
VINCENT MOYNIHAN  
JERRY SERLY  
HENRY O. WALTON

REGISTERED MAIL  
RETURN RECEIPT REQUESTED

September 18, 1968

Mr. Joe Carroll  
174 East 74th Street  
New York, New York

Dear Mr. Carroll:

Please be advised that Local 802 designates Wednesday, September 25, 1968 - 3:00 P.M. in the Executive Board Room of Loc al 802, A. F. of M., 261 West 52nd Street, New York, N.Y. for the purpose of negotiating a contract with you for the employment of our members.

Sincerely yours,

LOUIS CRITELLI, Secretary  
Local 802, A. F. of M.

118

*Putro's Piano Music*



**802**

A F of M

Chartered August 27th, 1921



AFFILIATED WITH A.F.L.-C.I.O.

# Associated Musicians of Greater New York

261 WEST 52nd STREET, NEW YORK 19, N.Y.

PLaza 7-7722

## Officers

President  
MAX L. ARONS  
Vice-President  
AL KNOPP  
Secretary  
LOUIS CRITELLI  
Treasurer  
MY JAFFE

## Executive Board

VINCENT BADALE  
IRVING BLOOM  
SHERMAN BRANDE  
AL BROWN  
PATSY FASANELLA  
CLIFTON GLOVER  
WILLIAM M. POWERS  
VINCENT ROSSITTO  
EARL SHENDELL

## Trial Board

Chairman  
CHARLES S. SOLLINGER

Clerk

LOU RUSS  
FRANK GARISTO  
EDWARD MANNATO  
MARTY MELFI  
IRVING MINK  
VINCENT MOYNIHAN  
JERRY SEELY  
HENRY O. WALTON

REGISTERED MAIL  
RETURN RECEIPT REQUESTED

September 18, 1968

Mr. Charles Peterson  
110 West 34th Street  
New York, New York

Dear Mr. Peterson:

Please be advised that Local 802 designates Friday September 27, 1968-3:00 P.M., in the Executive Board Room of Local 802, A. F. of M., 261 West 52nd Street, New York, N. Y., for the purpose of negotiating a contract with you for the employment of our members.

Sincerely yours,

LOUIS CRITELLI, SECRETARY  
Local 802, A. F. of M.

B7C

-65- 115

*Patronize Live Music*



Local  
**802**

LOUIS CRITELLI  
Secretary

ASSOCIATED MUSICIANS OF GREATER NEW YORK  
261 WEST 32nd STREET  
New York, N. Y. 10019



115

REGISTERED MAIL  
RETURN RECEIPT REQUESTED



4-7627

REGISTERED  
RETURN RECEIPT  
REQUESTED

Mr. Charles Peterson  
110 West 34th Street  
New York, New York

*Patronize Live Music*

Local  
**802**

LOUIS CRITELLI  
Secretary

ASSOCIATED MUSICIANS OF GREATER NEW YORK  
261 WEST 32nd STREET  
New York, N. Y. 10019



115

REGISTERED MAIL  
RETURN RECEIPT REQUESTED



407628

REGISTERED  
RETURN RECEIPT  
REQUESTED

Mr. Joe Carroll  
174 East 74th Street  
New York, New York

*Patronize Live Music*

**Injunction Order.****UNITED STATES COURT OF APPEALS,****FOR THE SECOND CIRCUIT.**

---

**JOSEPH CARROLL, CHARLES PETERSON and CHARLES TURECAMO, as Treasurer Orchestra Leaders of Greater New York,**

*Plaintiffs-Appellants,*

*against*

**AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, HERMAN D. KENIN, as President of said Federation, STANLEY BALLARD, as Secretary of said Federation and GEORGE V. CLANCY, as Treasurer of said Federation, ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, and AL MANUTI, as President of Local 802, MAX L. ARONS, as Secretary of Local 802 and HI JAFFE as Treasurer of Local 802,**

*Defendants-Respondents.*

**Docket Nos. 30445-30446.**

---

Upon this Court's decision and judgment made and entered herein January 30, 1967; the orders of this Court delaying issuance of the mandate herein; the joint affidavit of plaintiffs-appellants, Charles Peterson and Joseph Carroll, sworn to June 5, 1967; the affidavit of merit of Godfrey P. Schmidt, attorney for plaintiffs-appellants, sworn to June 26, 1967; upon the oral argument of Counsel for the parties; upon their annexed stipulation; and upon all of the proceedings had herein; it is

*Injunction Order*

ORDERED that, pending final disposition of these cases by the Supreme Court of the United States, defendant-respondent, Associated Musicians of Greater New York, Local 802 AFM, its officers, members, agents and attorneys and those in active concert or participation with them who receive actual notice of this order by personal service or otherwise, be, and the same hereby are, enjoined and restrained from

(i) requiring plaintiffs-appellants Ben Cutler, Joseph Carroll, Charles Peterson and Marty Levitt or any of them, to use any of the price-fixing forms, copies of which are annexed hereto, marked "Exhibits A, B and C respectively, to form part of this Order;

(ii) in any way penalizing or disciplining any of said plaintiffs-appellants because of his failure or refusal to execute any of said price-fixing forms even though such forms are currently mandated by by-laws promulgated by Local 802 or by its Executive Board or because of his failure to answer any Local 802 "summons" or charges signed by any officer or member of Local 802 upon the basis of such failure or refusal; and it is further

ORDERED that nothing herein contained shall be construed as forbidding use, by Local 802, of any form which, consistently with this Court's decision of January 30, 1967, herein, omits all provisions constituting in effect price-fixing.


Issued pursuant to Rule 65, F.R.C.P., this 31st day of October, 1967, at 9:08 o'clock A. M.

/s/ HENRY J. FRIENDLY

/s/ J. JOSEPH SMITH

/s/ ROBERT P. ANDERSON

**Exhibit A, Annexed to Injunction Order.**

(See opposite page.) 





## EXHIBIT A



## NOTICE OF SINGLE ENGAGEMENT CONTRACT

**Associated Musicians of Greater New York**

LOCAL 802, A.F. of M. • 261 WEST 52nd STREET • NEW YORK, N. Y. 10019 • PL 7-7722

OFFICE USE

## ENGAGEMENT INFORMATION (PRINT ONLY IN UNSHADED AREAS)

LEADER CARD NO. 1-8	LEGAL LEADER NAME E. M.	ENG. # 31	BORO CHECK ONE <input type="checkbox"/> 1. N.Y.C. <input type="checkbox"/> 2. B.M.N. <input type="checkbox"/> 3. B.M.B. <input type="checkbox"/> 4. S.I. <input type="checkbox"/> 5. I.A.S. - S.P.	TIME 7:30	TYPE ENG. 30	DATE OF ENG. 10-21-54	NO. OF MEN 15-20	PLACE OF ENGAGEMENT 30	HOURS INCL. OVERTIME 31-40	PRE. MEAT 42
------------------------	----------------------------	--------------	---	--------------	-----------------	--------------------------	---------------------	---------------------------	-------------------------------	-----------------

MILEAGE \_\_\_\_\_ CARTAGE \_\_\_\_\_ REHEARSAL \_\_\_\_\_ DOUBLING \_\_\_\_\_ TRANSPORTATION \_\_\_\_\_

OTHER PURCHASER OF MUSIC \_\_\_\_\_ ADDRESS \_\_\_\_\_ PHONE \_\_\_\_\_  
SIGNATURE \_\_\_\_\_

## INSTRUCTIONS

Complete top portion of form and present to Local 802 for acceptance and validation. Top of part 1 retained by Local. Top of part 2 becomes purchaser's receipt. Complete bottom portion at time of engagement. **IMMEDIATELY** following engagement, return form with remittance to Local for validation. Bottom of parts 1 & 2 retained by Union. Part 3 returned to leader.

The Leader warrants that the contract with the Purchaser of the Music for the above engagement provides for —  
(1) Sufficient monies to be paid by the Purchaser of the Music, so that each musician performing on the engagement, will be paid at least the current minimum wage scales applicable to this engagement for the hours and conditions set forth above.

(2) The payment by the Purchaser of One (\$1.00) Dollar for each musician performing on the engagement, as contributions to the Local 802 Musical Engagements Welfare Fund. The Leader agrees that he will be responsible for the collection and payment of these contributions to the Welfare Fund; and he further agrees to be bound by the terms of the Agreement and Declaration of Trust made the 22nd day of April, 1954, between the Hotel Men's Committee for Hotel Users of Music, the Restaurant League of New York, the Associated Musicians of Greater New York, Local 802, and the Trustees of the said Fund, as amended.

(3) Sufficient monies to be paid by the Purchaser to cover the Costs where applicable of Unemployment Insurance, Social Security, N. Y. State Disability Benefits and Workman's Comp.

The Leader further agrees that he will, after the performance of the above engagement, report to Local 802, on forms to be supplied by Local 802, the name, card number and scale earnings of each musician who performed on the engagement.

(4) An Employee hired for this engagement shall be free without liability to cease service by reason of any strike.

(5) Representatives of the Local shall have access to the place of performance to confer with the employees.

LEADER'S SIGNATURE \_\_\_\_\_ ADDRESS \_\_\_\_\_ PHONE \_\_\_\_\_

## SINGLE ENGAGEMENT PERFORMANCE REPORT

1. Print all required information except signature.

2. We the undersigned, authorize the leader to deduct from our pay for this engagement our Local 802 work dues in the amount of 1 1/4% of our gross scale compensation, and to transmit such dues to Local 802 by check made payable to "Local 802, A. F. of M."

3. The leader agrees to transmit a check for the deducted work dues, together with a separate check made payable to the "Local 802 Musical Engagements Welfare Fund" covering the purchasers welfare fund payment in the sum of \$1.00 per performing musician.

4. Failure to file this report with work dues and welfare fund payments constitutes a violation of Article 4, Section 1 of the Local 802 By-Laws.

## PRINT OR TYPE ALL INFORMATION CLEARLY

1. LEADER'S CARD NO.	PRINT OR TYPE NAME	CITY	STATE	ZIP	STREET ADDRESS	SOCIAL SECURITY NO.	NO. OF EXEMPTIONS
2 SUB LEADER'S CARD NO.	PRINT OR TYPE NAME	CITY	STATE <td>ZIP</td> <td>STREET ADDRESS</td> <td>SOCIAL SECURITY NO.</td> <td>NO. OF EXEMPTIONS</td>	ZIP	STREET ADDRESS	SOCIAL SECURITY NO.	NO. OF EXEMPTIONS
3. CARD NO.	PRINT OR TYPE NAME	CITY	STATE <td>ZIP</td> <td>STREET ADDRESS</td> <td>SOCIAL SECURITY NO.</td> <td>NO. OF EXEMPTIONS</td>	ZIP	STREET ADDRESS	SOCIAL SECURITY NO.	NO. OF EXEMPTIONS
4. CARD NO.	PRINT OR TYPE NAME	CITY	STATE <td>ZIP</td> <td>STREET ADDRESS</td> <td>SOCIAL SECURITY NO.</td> <td>NO. OF EXEMPTIONS</td>	ZIP	STREET ADDRESS	SOCIAL SECURITY NO.	NO. OF EXEMPTIONS
5. CARD NO.	PRINT OR TYPE NAME	CITY	STATE <td>ZIP</td> <td>STREET ADDRESS</td> <td>SOCIAL SECURITY NO.</td> <td>NO. OF EXEMPTIONS</td>	ZIP	STREET ADDRESS	SOCIAL SECURITY NO.	NO. OF EXEMPTIONS
6. CARD NO.	PRINT OR TYPE NAME	CITY	STATE <td>ZIP</td> <td>STREET ADDRESS</td> <td>SOCIAL SECURITY NO.</td> <td>NO. OF EXEMPTIONS</td>	ZIP	STREET ADDRESS	SOCIAL SECURITY NO.	NO. OF EXEMPTIONS
7. CARD NO.	PRINT OR TYPE NAME	CITY	STATE <td>ZIP</td> <td>STREET ADDRESS</td> <td>SOCIAL SECURITY NO.</td> <td>NO. OF EXEMPTIONS</td>	ZIP	STREET ADDRESS	SOCIAL SECURITY NO.	NO. OF EXEMPTIONS
8. CARD NO.	PRINT OR TYPE NAME	CITY	STATE <td>ZIP</td> <td>STREET ADDRESS</td> <td>SOCIAL SECURITY NO.</td> <td>NO. OF EXEMPTIONS</td>	ZIP	STREET ADDRESS	SOCIAL SECURITY NO.	NO. OF EXEMPTIONS
9. CARD NO.	PRINT OR TYPE NAME	CITY	STATE <td>ZIP</td> <td>STREET ADDRESS</td> <td>SOCIAL SECURITY NO.</td> <td>NO. OF EXEMPTIONS</td>	ZIP	STREET ADDRESS	SOCIAL SECURITY NO.	NO. OF EXEMPTIONS
10. CARD NO.	PRINT OR TYPE NAME	CITY	STATE <td>ZIP</td> <td>STREET ADDRESS</td> <td>SOCIAL SECURITY NO.</td> <td>NO. OF EXEMPTIONS</td>	ZIP	STREET ADDRESS	SOCIAL SECURITY NO.	NO. OF EXEMPTIONS

OFFICE USE ONLY

DATE SUBMITTED \_\_\_\_\_

ACCEPTED BY \_\_\_\_\_

LEADER'S SIGNATURE \_\_\_\_\_

PAY AMOUNTS AS INSTRUCTED

EXHIBIT A

WARNING

CANCELLATION OF ENGAGEMENT MUST BE REPORTED TO LOCAL 802 SINGLE ENGAGEMENT WORK DUES DEPT. PRIOR TO DATE OF ENGAGEMENT.

IF CONTINUATION REPORTS ARE USED


PLACE GRAND TOTALS IN ABOVE AMOUNT AREAS.

PRINTED BY N.Y.C. CO.

EXHIBIT B

MOORE BUSINESS FORMS, INC., N. Y. N. Y.

**Exhibit B, Annexed to Injunction Order.**

**(See opposite page.)** 



## EXHIBIT B

### SINGLE ENGAGEMENT CONTRACT

# Associated Musicians of Greater New York

LOCAL 802, A.F. of M. • 261 WEST 52nd STREET • NEW YORK, N. Y. 10019 • PL 7-7722

ENGAGEMENT INFORMATION (PRINT ONLY IN UNSHADED AREAS)

LEADER CARD NO.	LEGAL LEADER NAME	ENO. #	BORO CHECK ONE	TIME	TYPE ENG.	DATE OF ENG.	NO. OF MEN	PLACE OF ENGAGEMENT	HOURS INCL OVERTIME	PRE- HEAT
1-5	6-20	23-25	24 <input type="checkbox"/> 1. NYC <input type="checkbox"/> 2. BETH. <input type="checkbox"/> 3. QUE. <input type="checkbox"/> 4. L.I. <input type="checkbox"/> 5. NASS. SUP.	27	78-29	30-31	35-36	57-58	51-51	42

MILEAGE \_\_\_\_\_ CARTAGE \_\_\_\_\_ REHEARSAL \_\_\_\_\_ DOUBLING \_\_\_\_\_ TRANSPORTATION \_\_\_\_\_

OTHER PURCHASER OF MUSIC \_\_\_\_\_ SIGNATURE \_\_\_\_\_ ADDRESS \_\_\_\_\_ PHONE \_\_\_\_\_

THE PURCHASER OF THE MUSIC SHALL PAY THE LEADER \$ \_\_\_\_\_, NOT LESS THAN THE APPLICABLE UNION SCALE INCLUDING OVERTIME AT THE HOURLY RATE OF \$ \_\_\_\_\_ FOR THIS ENGAGEMENT AS FOLLOWS: \_\_\_\_\_  
THE UNDERSIGNED LEADER HAS ENTERED INTO A CONTRACT WITH THE ABOVE PURCHASER FOR THE ENGAGEMENT AS LISTED ABOVE.

The Leader warrants that the contract with the Purchaser of the Music for the above engagement provides for —  
(1) Sufficient monies to be paid by the Purchaser of the Music, so that each musician performing on the engagement, will be paid at least the current minimum wage scales applicable to this engagement for the hours and conditions set forth above.

(2) The payment by the Purchaser of One (\$1.00) Dollar for each musician performing on the engagement, as contributions to the Local 802 Musical Engagements Welfare Fund. The Leader agrees that he will be responsible for the collection and payment of these contributions to the Welfare Fund; and he further agrees to be bound by the terms of the Agreement and Declaration of Trust made the 22nd day of April, 1954, between the Hotel Men's Committee for Hotel Users of Music, the Restaurant League of New York, the Associated Musicians of Greater New York, Local 802, and the Trustees of the said Fund, as amended.

(3) Sufficient monies to be paid by the Purchaser to cover the Costs where applicable of Unemployment Insurance, Social Security, N. Y. State Disability Benefits and Workman's Comp.

The Leader further agrees that he will, after the performance of the above engagement, report to Local 802, on forms to be supplied by Local 802, the name, card number and scale earnings of each musician who performed on the engagement.

(4) Any Employees hired for this engagement shall be free without liability to cease service by reason of any strike.

(5) Representatives of the Local shall have access to the place of performance to confer with the employees.

EXHIBIT B

LEADER'S SIGNATURE \_\_\_\_\_ ADDRESS \_\_\_\_\_ PHONE \_\_\_\_\_



**Exhibit C, Annexed to Injunction Order.**

AGREEMENT made the \_\_\_\_\_ day of \_\_\_\_\_, 196\_\_\_\_,  
by and between \_\_\_\_\_ of \_\_\_\_\_  
\_\_\_\_\_ (Herein called the  
"Leader-Employer") and the ASSOCIATED MUSICIANS OF  
GREATER NEW YORK, LOCAL 802, A.F. of M. (herein called  
the "Union").

WHEREAS, the Leader-Employer is desirous of employing members of the Union for musical performances in the single engagement field; and the Union is willing to have its members work for the Leader-Employer on the payment to them of applicable Union wage scales and the compliance by the Leader-Employer of all applicable Union rules and regulations, as well as of the terms set forth below.

Now, THEREFORE, in consideration of the premises, it is agreed as follows:

1. The Leader-Employer will notify the Union in writing, within        days after entering into any contract with a client or purchaser of music for the performance of music in the single engagement field, of the date, time and place of such engagement, and the number of musicians, including the Leader who will be performing on the engagement.

2. The Leader-Employer warrants that any such contract which he will enter into will provide for—

- (a) Sufficient monies to be paid by the client or purchaser of music, so that each musician performing on the engagement, including the Leader, will be paid at least the current minimum wage scales required by Article X of the Local 802 By-laws applicable to the particular engagement for the hours to be worked and any extras provided for in the contract.

*Exhibit C, Annexed to Injunction Order*

(b) Sufficient monies for the specific payment of One Dollar (\$1.00) for each musician performing on the engagement, including the Leader, as contributions to the Local 802 Musical Engagements Welfare Fund. The Leader-Employer agrees that he will be responsible for the collection and payment of these contributions to the said Welfare Fund; and he further agrees to be bound by the terms of the Agreement and Declaration of Trust made the 22nd day of April, 1954, between the Hotel Men's Committee for Hotel Users of Music, the Restaurant League of New York, the Associated Musicians of Greater New York, Local 802, and the Trustees of the said Fund; as amended.

(c) Sufficient monies to be paid by the client or purchaser of music to cover the costs of Unemployment Insurance, Social Security, New York State Disability Benefits Insurance and Workmen's Compensation for each musician performing on the engagement.

3. The Leader-Employer will supply to the Union, on forms to be supplied by the Union, the name, card number and scale earnings of each musician who performed on the engagement. Such forms, together with the required payments to the Welfare Fund, will be returned within fourteen (14) days after they have been mailed by the Union. If the Leader-Employer has authorizations from the musician to do so, he will also forward with this form payment of the Union's work dues checked-off from their earnings.

Date, \_\_\_\_\_ 196

\_\_\_\_\_  
Leader-Employer

ASSOCIATED MUSICIANS OF GREATER  
NEW YORK, LOCAL 802, A.F. of M.



# SUPREME COURT OF THE UNITED STATES

Nos. 309 AND 310.—OCTOBER TERM, 1967.

American Federation of Musicians  
of the United States and  
Canada et al., Petitioners,

309

v.

Joseph Carroll et al.

Joseph Carroll et al., Petitioners,

310

v.

American Federation of Musicians  
of the United States and  
Canada et al.

On Writs of Certio-  
rari to the United  
States Court of  
Appeals for the  
Second Circuit.

[May 20, 1968.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This action for injunctive relief and treble damages alleging violations of the Sherman Act, 15 U. S. C. §§ 1 and 2, was brought in the District Court for the Southern District of New York against the petitioners American Federation of Musicians and its Local 802.<sup>1</sup> The question is whether union practices of the petitioners affecting orchestra leaders violate the Sherman Act as activities in combination with a "non-labor" group, or are exempted by the Norris-LaGuardia Act as activities affecting a "labor" group which is party to a "labor dispute."<sup>2</sup>

<sup>1</sup> Respondents Peterson and Carroll filed the first action in July 1960 and the other in December 1960. The latter was brought to challenge an increase in the musicians wage scale adopted after the first complaint was filed. The other respondents were allowed to intervene. By stipulation the testimony in *Carroll v. Associated Musicians*, 206 F. Supp. 462, 316 F. 2d 574, and *Cutler v. American Federation of Musicians*, 211 F. Supp. 433, 316 F. 2d 546, was made part of the record.

<sup>2</sup> 29 U. S. C. § 113 (c); see also Clayton Act, 15 U. S. C. § 17, 29 U. S. C. § 52.

## 2 FEDERATION OF MUSICIANS v. CARROLL.

After a five-week trial without a jury the District Court dismissed the action on the merits, holding that all of the petitioners' practices brought in question "come within the definition of the term 'labor dispute' . . . and are exempt from the antitrust laws." 241 F. Supp. 865, 894. The Court of Appeals for the Second Circuit reversed on the issue of alleged pricefixing, but in all other respects affirmed the dismissal. 372 F. 2d 155. Both parties sought certiorari, the petitioners in No. 309 from the reversal of the dismissal in respect of alleged pricefixing, and the respondents in No. 310 from the affirmance of the dismissal in the other respects. We granted both petitions, 389 U. S. 817. We hold that the District Court properly dismissed the action on the merits, and that the Court of Appeals should have affirmed the District Court judgment in its entirety.

### I.

The petitioners are labor unions of professional musicians. The union practices questioned here are mainly those applied to "club-date" engagements of union members. These are one-time engagements of orchestras to provide music, usually for only a few hours, at such social events as weddings, fashion shows, commencements, and the like.<sup>3</sup> The purchaser of the music, *e. g.*, the father of the bride, the chairman of the events, etc., arranges with a musician, or with a musician's booking agent, to provide an orchestra of a conductor and a given number

---

<sup>3</sup> "Musical engagements are generally classified as either 'steady,' those lasting for longer than one week, or 'single,' usually one day or one performance affairs but including all engagements lasting less than one week. The much sought after steady engagements are rare in comparison with the number of single engagements.

"The predominant form of single engagement is the 'club date' . . . . Single engagements also include the 'non-club date' field, consisting of television appearances or recording engagements, etc. . . ." 372 F. 2d, at 158.

of instrumentalists, or "sidemen," at a specified time and place. The musician in such cases assumes the role of "leader" of the orchestra, obtains the "sidemen" and attends to the bookkeeping and other details of the engagement. Usually the "leader" performs with the orchestra, sometimes only conducting but also often playing an instrument. When he does not personally appear, he designates a "subleader" who conducts for him and often also plays an instrument.

A musician performing "club-dates" may perform in different capacities on the same day or during the same week, at times as leader and other times as subleader or sideman. The four respondents, however, are musicians who usually act as leaders and maintain offices and employ personnel to solicit engagements through advertising and personal contacts. When two or more engagements are accepted for the same time, each of the respondents will conduct, and, except respondent Peterson, sometimes play, at one and designate a subleader to perform the functions of leader at the other.<sup>4</sup>

The four respondents were members of the petitioner Federation and Local 802 when this suit was filed.<sup>5</sup> Virtually all musicians in the United States and the great

---

<sup>4</sup> Both the District Court and the Court of Appeals held that respondents did not prove that they properly represented a class under former Fed. Rules Civ. Proc. 23 (a), 241 F. Supp., at 884-886; 372 F. 2d, at 161-163. The record sustains this conclusion. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U. S. 356; *Hansberry v. Lee*, 311 U. S. 32. Since all of the plaintiffs either play an instrument or conduct their orchestras unless they book more than one engagement for the same time, we do not have before us a leader who merely books engagements and never appears with his orchestra.

<sup>5</sup> Carroll and Peterson have since been expelled from membership. See 241 F. Supp., at 870. Both are still permitted to book engagements and hire musicians to play at them but cannot appear with their orchestra either as conductors or instrumentalists. See *Carroll v. American Federation of Musicians*, 310 F. 2d 325.

#### 4 FEDERATION OF MUSICIANS v. CARROLL.

majority of the orchestra leaders are union members. There are no collective bargaining agreements in the club-date field.<sup>6</sup> Club-date engagements are rigidly regulated by unilaterally adopted union bylaws and regulations. Under these bylaws and regulations

(1) Petitioners enforce a closed shop and exert various pressures upon orchestra leaders to become union members.

(2) Orchestra leaders must engage a minimum number of sidemen for club-date engagements.

(3) Orchestra leaders must charge purchasers of music minimum prices prescribed in a "Price List Booklet." The prices are the total of (a) the minimum wage scales for sidemen, (b) a "leader's fee" which is double the sideman's scale when four or more musicians comprise the orchestra and (c) an additional 8% to cover social security, unemployment insurance, and other expenses. When the leader does not personally appear at an engagement, but designates a subleader and four or more musicians perform, the leader must pay the subleader one and one-half the wage scale out of his "leader's fee."

(4) Orchestra leaders are required to use a form of contract, called the Form B contract, for all engagements. In the club-date field, however, Local 802 accepts assurances that the terms of club-date engagements comply with all union regulations and provide for payment of the minimum wage. Union business agents police compliance.

(5) Additional regulations apply to traveling engagements. The leader of a traveling orchestra must charge

---

<sup>6</sup> "The distinction between the kinds of single engagements is vital; the 'non-club date' engagements are ordinarily governed by collective bargaining agreements . . . . The same is usually true of the steady engagement field. Local 802 has collective bargaining agreements with the major users or 'purchasers' of live music within its area such as recording companies, hotels, television and film producers, opera companies and theatres." 372 F. 2d, at 158.

10% more than the minimum price of either the home local or of the local in whose territory the orchestra is playing, whichever is greater.

(6) Orchestra leaders are prohibited from accepting engagements from or making any payments to caterers.

(7) Orchestra leaders may accept engagements made by booking agents only if the booking agents have been licensed by the unions under standard forms of license agreements provided by the unions.

The District Court assumed, and the Court of Appeals held, that orchestra leaders in the club-date field are employers and independent contractors.<sup>7</sup> Respondent argues that petitioners' involvement of the orchestra leaders in the promulgation and enforcement of the challenged regulations and bylaws creates a combination or conspiracy with a "non-labor" group which violates the Sherman Act. *Allen Bradley Co. v. Local 3, etc.*, 325 U. S. 797, 800; *Los Angeles Meat and Provision Drivers Union v. United States*, 371 U. S. 94; *Mine Workers v. Pennington*, 381 U. S. 657. But the Court of Appeals concurred in the finding of the District Court that such orchestra leaders, although deemed to be employers and independent contractors, constitute not a "non-labor" group but a "labor" group. 372 F. 2d, at 168.<sup>8</sup>

The criterion applied by the District Court in determining that the orchestra leaders were a "labor" group and parties to a "labor dispute" was the "presence of a

<sup>7</sup> See 241 F. Supp., at 887; 372 F. 2d, at 159. We need not decide the question.

<sup>8</sup> The Court of Appeals also found "no evidence of a conspiracy between Local 802, or the Federation, and orchestra leaders to eliminate competitors, fix prices or achieve any other commercial restraint, nor was such a finding made by the district judge. Rather, the record establishes that all restraints were instituted unilaterally by the unions and acquiesced in by the orchestra leaders." 372 F. 2d, at 164; see 241 F. Supp., at 891.



6 FEDERATION OF MUSICIANS v. CARROLL.

job or wage competition or some other economic inter-relationship affecting legitimate union interests between the union members and the independent contractors. If such a relationship existed the independent contractors were a 'labor group' and party to a labor dispute under the Norris-LaGuardia Act." 241 F. Supp., at 887. The Court of Appeals held, and we agree, that this is a correct statement of the applicable principles. The Norris-LaGuardia Act took all "labor disputes" as therein defined outside the reach of the Sherman Act and established that the allowable area of union activity was not to be restricted to an immediate employer-employee relation. *United States v. Hutcheson*, 312 U. S. 219, 229-236; *Allen Bradley Co. v. Local 3*, *supra*, at 805-806; *Los Angeles Meat Drivers Union v. United States*, *supra*, at 103; *Milk Wagon Drivers Union v. Lake Valley Farm Prods.*, 311 U. S. 91. "This Court has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such activity may be to eliminate competition based on differences in such standards." *Mine Workers v. Pennington*, 381 U. S. 657, 666.

The District Court found that the orchestra leaders performed work and functions which actually or potentially affected the hours, wages, job security, and working conditions of petitioners' members.<sup>9</sup> These findings have substantial support in the evidence and in the light of the job and wage competition thus established, both courts correctly held that it was lawful for petitioners to pressure the orchestra leaders to become union members, *Los Angeles Meat Drivers*, *supra*, and *Milk Wagon*

<sup>9</sup> "... [I]n the club date and hotel steady engagement fields . . . orchestra leaders are in competition with employee members of the . . . unions regarding jobs, wages and other working conditions. As a result, they comprise a labor group in these fields." 241 F. Supp., at 887-888.

*Drivers, supra*, to insist upon a closed shop, *United States v. American Federation of Musicians*, 318 U. S. 741, affirming, 47 F. Supp. 304, to refuse to bargain collectively with the leaders, see *Hunt v. Crumboch*, 325 U. S. 821, to impose the minimum employment quotas complained of, *United States v. American Federation of Musicians, supra*, to require the orchestra leaders to use the Form B contract, see *Teamsters Union v. Oliver*, 362 U. S. 605 (*Oliver II*), and to favor local musicians by requiring that higher wages be paid to musicians from outside a local's jurisdiction, *Rambusch Decorating Co. v. Brotherhood of Painters*, 105 F. 2d 134.

The District Court also sustained the legality of the "Price List" stating, "In view of the competition between leaders and sidemen and subleaders which underlies the finding that the leaders are a labor group, the union has a legitimate interest in fixing minimum fees for a participating leader and minimum engagement prices equal to the total minimum wages of the sidemen and the participating leader." 241 F. Supp., at 890. The Court of Appeals, one judge dissenting, disagreed that the "Price List" was within the labor exemption, stating that "the unions' establishment of price floors on orchestral engagements constitutes a per se violation of the Sherman Act." 372 F. 2d, at 165. The premise of the majority's conclusion was that the "Price List" was disqualified for the exemption because its concern is "prices" and not "wages." But this overlooks the necessity of inquiry beyond the form. MR. JUSTICE WHITE's opinion in *Meat Cutters v. Jewell Tea*, 381 U. S. 676, 690, n. 5, emphasized that "[t]he crucial determinant is not the form of the agreement—*e. g.*, prices or wages—but its relative impact on the product market and the interests of union members." It is therefore not dispositive of the question that petitioners regulation in form establishes price floors. The critical inquiry is whether the price floors in actuality

## 8 FEDERATION OF MUSICIANS v. CARROLL.

operate to protect the wages of the subleader and sidemen. The District Court found that the price floors were expressly designed to and did function as a protection of sidemen's and subleaders' wage scales against the job and wage competition of the leaders. The Court said:

"As a consequence of this relationship, the practices of [orchestra leaders] when they lead and play must have a vital effect on the working conditions of the non-leader members of the union. If they undercut the union wage scale or do not adhere to union regulations regarding hours or other working conditions when they perform they will undermine these union standards. They would put pressure on the union members they compete with to correspondingly lower their own demands." 241 F. Supp., at 888.

The Court of Appeals itself expressed a similar view in saying:

"even those orchestra leaders who, as employers in club dates, lead but never perform as players, are proper subjects for membership because they are in job competition with union subleaders; each time a non-union orchestra leader performs, he displaces a 'union job' with a 'non-union job.'" 372 F. 2d, at 168.

And of particular significance, the Court of Appeals noted that where the leader performs

"... the services of a subleader would not be required and the leader may in this way save the wages he would otherwise have to pay. Consequently, he could make the services of his orchestra available at a lower price than could a non-performing leader." 372 F. 2d, at 166.

Thus the price floors, including the minimums for leaders, are simply a means for coping with the job and wage competition of the leaders to protect the wage scales of musicians who respondents concede are employees on club-dates, namely sidemen and subleaders. As such the provisions of the "Price List" establishing those floors are indistinguishable in their effect from the collective bargaining provisions in *Teamsters Union v. Oliver*, 358 U. S. 283, which we held governed not prices but the mandatory bargaining subject of wages. The precise issue in *Oliver* was whether Article XXXII of a multi-employer, multistate collective bargaining agreement between the Teamsters Union and a bargaining organization of motor carriers dealt with a mandatory subject of bargaining. Article XXXII provided that drivers who own and drive their own vehicles should be paid, in addition to the prescribed driver's wage, not less than a prescribed minimum rental for the use of their vehicles. We held that the article was a wage and not a price provision, saying:

"The inadequacy of a rental which means that the owner makes up his excess costs from his driver's wages not only clearly bears a close relation to labor's efforts to improve working conditions but is in fact of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service. . . ." 358 U. S., at 294.

We disagree with the Court of Appeals that "[t]he circumstances constituting a possible threat to the employment of sub-leaders or the displacement of a sideman are not at all comparable," 372 F. 2d, at 166. The price floors here serve the identical ends served by Article XXXII in *Oliver*. The Price List has in common with

## 10 FEDERATION OF MUSICIANS v. CARROLL.

Article XXXII the objective to protect employees' job opportunities and wages from job and wage competition of other union members—in the case of the Article, drivers when they drive their own vehicles, and in the case of the Price List, musicians on the occasions they are leaders and play a role as employers. Like the Article, the Price List is therefore "... a direct and frontal attack upon a problem thought to threaten the maintenance of the basic wage structure . . . ." 358 U. S., at 294.<sup>10</sup>

The majority of the Court of Appeals apparently regarded *Meat Cutters v. Jewell Tea*, *supra*, to militate against this conclusion. The majority read the opinions of MR. JUSTICE WHITE and Mr. Justice Goldberg in that case as requiring a holding that "... mandatory subjects of collective bargaining carry with them an exemption . . .," but that "[o]n matters outside of the mandatory area . . . no such considerations govern . . . ." 372 F. 2d, at 165. Even if only mandatory subjects of bargaining enjoy the exemption—a question not in this case and upon which we express no view—nothing MR. JUSTICE WHITE or Mr. Justice Goldberg said remotely suggests that the distinction between mandatory and nonmandatory subjects turns on the form of the method taken to protect a wage scale, here a price floor. To the

---

<sup>10</sup> The "Price List" establishes only a minimum charge; there is no attempt to set a maximum. Nor does the union attempt by its minimum charge to assure the leader a profit above the fair value of his labor services. The District Court found no evidence "which indicates that the increment to the [leader] is unrelated to his costs in that function." 241 F. Supp., at 841. See also 372 F. 2d, at 170 (Friendly, J., dissenting): "A different result might be warranted if the floor were set so high as to cover not merely compensation for the additional services rendered by a leader but entrepreneurial profit as well. But there has been no such showing here."



contrary, we pointed out above that Mr. JUSTICE WHITE's opinion emphasized that the "crucial determinant is not the form of the agreement . . ." and cited *Oliver* as settling that proposition. 381 U. S., at 690, n. 5.

The reasons which entitle the Price List to the exemption embrace the provision fixing the minimum price for a club-date engagement when the orchestra leader does not perform, and does not displace an employee-musician.<sup>11</sup> That regulation is also justified as a means of preserving the scale of the sidemen and subleaders. There was evidence that when the leader does not collect from the purchaser of the music an amount sufficient to make up the total of his out-of-pocket expenses, including the sum of his wage-scale wages and the scale wages of the sidemen,<sup>12</sup> he will, in fact, not pay the sidemen the prescribed scale. The District Court found:

"It is unquestionably true that skimping on the part of the person who sets up the engagement [the leader] so that his costs are not covered is likely to have an adverse effect on the fees paid to the participating musicians. By fixing a reasonable amount over the sum of the minimum wages of the musicians participating in an engagement to cover these

---

<sup>11</sup> Because of the intense competition for positions as leader, the full-time leader "displaces" another union member simply by securing an engagement for himself. Union members who act principally as sidemen and subleaders but who act occasionally as leaders "bid for the same jobs as full-time leaders such as plaintiffs and perform the same musical service when they get a job. They also perform in the same places as full-time leaders." 241 F. Supp., at 872.

<sup>12</sup> Only two things can happen when the leader does not charge the specified minimum; either he works below union scale or the musicians he employs work below union scale. In either event the result is price competition through differences of standards in the labor market.

## 12 FEDERATION OF MUSICIANS v. CARROLL

expenses, the union insures that 'no part of the labor costs paid to a . . . [leader] would be diverted by him for overhead or other non-labor costs' . . . ."

241 F. Supp., at 891.

In other words, the price of the product—here the price for an orchestra for a club-date—represents almost entirely the scale wages of the sidemen and the leader. Unlike most industries, except for the 8% charge, there are no other costs contributing to the price. Therefore, if leaders cut prices, inevitably wages must be cut.

The analyses of MR. JUSTICE WHITE and Mr. Justice Goldberg in *Jewel Tea* supports our conclusion. *Jewel Tea* did not hold that an agreement respecting marketing hours would always come within the labor exemption. Rather that case held that such an agreement was lawful because it was found that the marketing-hours restriction had a substantial effect on hours worked by the union members. Similarly, the price-list requirement is brought within the labor exemption under the finding that the requirement is necessary to assure that scale wages will be paid to the sidemen and the leader. If the union may not require that the full-time leader charge the purchaser of the music an amount sufficient to compensate him for the time he spends selecting musicians and performing the other musical functions involved in leading, the full-time leader may compete with other union members who seek the same jobs through price differentiation in the product market based on differences in a labor standard. His situation is identical to that of a truck owner in *Oliver* who does not charge an amount sufficient to compensate him for the value of his labor services in driving the truck, and is a situation which the union can prevent consistent with its antitrust exemption. There can be no differentiation between the leader who appears with his orchestra and

the one who on occasion hires a sub-leader. In either case part of the union prescribed "leader's fee" is attributable to service rendered in either conducting or playing and part to the service rendered in selecting musicians, bookkeeping, etc. The only difference is that in the former situation the leader keeps the entire fee while in the latter he is required to pay that part of it attributable to playing or conducting to the subleader. In this respect we agree with the view espoused by Judge Friendly in his dissent, 372 F. 2d, at 168-170.

We think also that the caterer and booking agent restrictions "are at least as intimately bound up with the subject of wages," *Oliver II, supra*, at 606, as the price floors. The District Court found that the booking agent regulations were adopted because of experience that "many booking agents charged exorbitant fees to members and booked engagements for musicians at wages which were below union scale." 241 F. Supp., at 881-882. On the basis of these findings, the District Court concluded:

"Because the activities of the booking agents here have and had a direct and substantial effect on the wages of the members of [the unions], I find that they are in an economic interrelationship with the members . . . such that the [unions] are justified in regulating their activities . . . . Furthermore, I find the regulations to be reasonably related to their interest in maintaining observance of union wage scales and working conditions." 241 F. Supp., at 893.

The finding concerning the caterer regulations was to the same effect.

"The evidence discloses that caterers took advantage of their position before the union adopted its regulations to, in effect, book orchestras and they

#### 14 FEDERATION OF MUSICIANS v. CARROLL.

continue to do so, at least to some extent. Caterers recommend orchestras to customers and receive commissions from orchestra leaders. These practices actually or potentially affect the wages of the musicians involved.

"I believe that this constitutes an economic inter-relationship which permits the defendants to regulate and prohibit the booking activities of the caterers without violating the Sherman Act." 241 F. Supp., at 893.

The judgment of the Court of Appeals is vacated and the case is remanded with direction to enter a judgment affirming the judgment of the District Court in its entirety.

*It is so ordered.*

THE CHIEF JUSTICE and MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

# SUPREME COURT OF THE UNITED STATES

Nos. 309 AND 310.—OCTOBER TERM, 1967.

American Federation of Musicians  
of the United States and  
Canada et al., Petitioners,

309

v.

Joseph Carroll et al.

Joseph Carroll et al., Petitioners,  
310

v.

American Federation of Musicians  
of the United States and  
Canada et al.

On Writs of Certio-  
rari to the United  
States Court of  
Appeals for the  
Second Circuit.

[May 20, 1968.]

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACK joins, dissenting.

In my view the Court is misled by the peculiar role of bandleaders and the peculiar economics of the club-date music industry, and fashions a rule which, if comprehensible at all, has unfortunate consequences for the delicate and difficult area of conflict between antitrust and labor policy.

The four petitioners in No. 310 (hereafter petitioners) are successful bandleaders whose success has made it unnecessary for them to continue working from time to time as sidemen and subleaders. However they do work as leaders.<sup>1</sup> Indeed, their business practice was to lead individually whenever they obtained an engagement, hiring a subleader only when they obtained two or more engagements at conflicting times. Leading a band was obviously

<sup>1</sup> Rather, they worked as leaders until their insubordination resulted in expulsion from the union. See 241 F. Supp. 865, 870 (D. C. S. D. N. Y. 1965).



## 2 FEDERATION OF MUSICIANS v. CARROLL.

one important part of their working careers; it was not, however, the only part. Petitioners also devoted much time and energy to organizing and managing their businesses. They advertised, and in other ways obtained engagements. They planned the music to be provided at those engagements. They chose, recruited, and supervised the subleaders and sidemen working for them. And they established and directed the administrative operation necessary for obtaining and fulfilling engagements.

The Court accepts the finding that petitioners were a "labor" group. I would think it beyond dispute that leading a band (a task which usually includes also occasional playing of an instrument) is "labor group work," but that it is equally beyond dispute that managing and administering a business whose function is supplying bands to fathers of brides is not "labor group work."<sup>2</sup> The first task, leading, certainly possesses "economic interrelationship[s] affecting legitimate union interests,"<sup>3</sup> and the second clearly does not. The Court appears to feel that because petitioners work includes some "labor group" tasks, all aspects of petitioners' activities are proper subjects of union concern. I see no reason why the law in this area cannot be sufficiently flexible to grant the union antitrust immunity for regulation of those activities of bandleaders which sufficiently affect union members, while denying that immunity where the union has no proper concern.

*Teamsters Union v. Oliver*, 358 U. S. 283 (1959), is a difficult case, but an important one, with which I fully agree.<sup>4</sup> *Oliver*, as I read it, holds that where independent

<sup>2</sup> See *Columbia River Packers Assn. v. Hinton*, 315 U. S. 143 (1942).

<sup>3</sup> 241 F. Supp., at 887.

<sup>4</sup> See *Meat Cutters v. Jewel Tea Co.*, 381 U. S. 676, 690, n. 5 (1965).

contractors are doing work for an employer in competition with the work of union members, the union can bargain with the employer to make certain they are not doing that work at a lower wage than that paid to members.<sup>5</sup> Since in *Oliver* an independent truckdriver who claimed to be charging the union rate for his labor but received in addition less than his costs for equipment and gasoline would in fact be cutting the union wage scale, the Court held that the union did not violate the antitrust laws when it bargained about the total amount—including both wage and equipment costs—that the companies would pay to the independent owner-drivers. On the facts before us, *Oliver* is relevant, but not across-the-board, as the Court seems to think. Here, when one of petitioners leads, he does work—playing and leading—which is also done by union members, and for which the union has a proper concern. The union thus has a right to see that the petitioner does not perform that work for less than the going scale for union musicians and subleaders. Since the leader fixes a single charge to compensate him for both leading and organizing, the union can require the leader to make that charge not less than the union scale for a subleader plus the leader's costs in obtaining the engagement, hiring the musicians, and planning the program. Since, as Judge Friendly said in dissent below, the price the union requires leaders to charge has not been shown to be "set so high as to cover not merely compensation for the additional services rendered by a leader but entrepreneurial profit as well,"<sup>6</sup> the union should be free of antitrust

<sup>5</sup> The union could have bargained for restrictions on contracting out of work by the employer. *Fibreboard Paper Products Corp. v. NLRB*, 379 U. S. 203 (1964).

<sup>6</sup> 372 F. 2d 155, 170 (C. A. 2d Cir. 1967).

#### 4 FEDERATION OF MUSICIANS v. CARROLL.

liability for imposing this minimum rate on charges by leaders when they actually lead. *Oliver* so holds.

The question is quite different, however, when we deal with imposition of fixed minimum charges by leaders for engagements at which they do not themselves lead. For such engagements the role of the leader is solely that of entrepreneur: he obtains a customer (partly, it appears, through the attraction of his reputation as an established provider of music), makes the necessary arrangements for servicing the customer, including employment and supervision of staff, and maintains the administrative structure required for this work: office, payroll clerk, permanent telephone listing, and so forth. The union has of course a full right to impose on this leader, who is in effect an employer, its minimum scale for work by sidemen and subleaders. The musicians' union, however, goes further. It requires that, for an engagement of four or more musicians, the leader charge his customer not less than the sideman's scale times the number of musicians (including the subleader), plus double the sideman's scale to compensate the leader, of which half—plus the sideman's scale—goes to the subleader. The union is clearly requiring that the leader charge his customer more than the total of the leader's wage bill, even though the leader himself does no "labor group" work.

There is no clear holding by this Court that a union is not immune from antitrust immunity when it requires that all the employers with whom it deals charge uniform prices. It has certainly been assumed, however, that the Norris-LaGuardia exemption to the antitrust laws does not extend this far. In *Meat Cutters v. Jewel Tea Co.*, 381 U. S. 676 (1965), the entire Court joined opinions strongly suggesting there is no antitrust immunity for a union which joins with employers to fix the prices at which the employers sell to the public. I wrote, in

an opinion joined by THE CHIEF JUSTICE and MR. JUSTICE BRENNAN:

"Jewel, for example, need not have bargained about or agreed to a schedule of prices at which its meat would be sold and the union could not legally have insisted that it do so. But if the unions had made such a demand, Jewel had agreed and the United States or an injured party had challenged the agreement under the antitrust laws, we seriously doubt that either the unions or Jewel could claim immunity by reason of the labor exemption, whatever substantive questions of violation there might be." 381 U. S., at 689.

Mr. Justice Goldberg, joined by JUSTICES HARLAN and STEWART, wrote:

"The direct and overriding interest of unions in such subjects as wages, hours, and other working conditions, which Congress has recognized in making them subjects of mandatory bargaining, is clearly lacking where the subject of the agreement is price-fixing and market allocation. Moreover, such activities are at the core of the type of anticompetitive commercial restraint at which the antitrust laws are directed." 381 U. S., at 732-733.

MR. JUSTICE DOUGLAS, dissenting in *Jewel Tea* and joined by JUSTICES BLACK and Clark, wrote:

"[T]he unions can no more aid a group of businessmen to force their competitors to follow uniform store marketing hours than to force them to sell at fixed prices. Both practices take away the freedom of traders to carry on their business in their own competitive fashion." 381 U. S., at 737.<sup>7</sup>

<sup>7</sup> As one commentator has concluded, "Although the Court split on the application of this proposition, all the justices agreed that the antitrust laws would be offended by a collective bargaining agree-

## 6 FEDERATION OF MUSICIANS v. CARROLL.

Unions are, of course, not without interest in the prices at which employers sell. As the majority points out, by seeing that employers sell at prices covering all their costs, a union can insure employer solvency and make more certain employee collection of wages owed them. In addition, assuring that competing employers charge at least a minimum price prevents price competition from exerting downward pressure on wages. On the other hand price competition, a significant aid to satisfactory resource allocation and a deterrent to inflation, would be substantially diminished if industry-wide unions were free to dictate uniform prices through agreements with employers.<sup>8</sup> I have always thought that this strong policy outweighed the legitimate union interest in the prices at which employers sell, and until today I had thought that the Court agreed. Of course the lack of discussion of this question in the majority's opinion, and the failure to refer to the unanimous rejection in *Jewel Tea* of antitrust immunity for union efforts to fix industrywide prices, suggest that the Court takes this step without full awareness of the implications and the likely consequences. The step is nonetheless disturbing, and I must record my dissent.

I am also in disagreement with the majority about certain of the questions presented in No. 310. The musi-

ment binding employers to charge a certain price for their goods." P. Areeda, *Antitrust Analysis* 52 (1967). See also *Mine Workers v. Pennington*, 381 U. S. 657, 663 (1965): "If the UMW in this case, in order to protect its wage scale by maintaining employer income, had presented a set of prices at which the mine operators would be required to sell their coal, the union and the employers who happened to agree could not successfully defend this contract provision if it were challenged under the antitrust laws by the United States or by some party injured by the arrangement."

<sup>8</sup> See J. T. Dunlop, *Wage Determination Under Trade Unions* (1950); C. E. Lindblom, *Unions and Capitalism* (1949); E. S. Mason, *Economic Concentration and the Monopoly Problem* (1957).



cians union imposes its rules not only on petitioners, who sometimes lead and sometimes hire subleaders, but upon leaders who never lead personally. These leaders are merely independent businessmen, performing no "labor group" work, and the union has no proper interest in regulating their activities. Even though the District Court found that the union imposed its rules on these leaders, I believe the facts as found below demonstrate that the union formed a combination with those independent businessmen.<sup>9</sup> If the union and employers combined, I have no doubt that some of the regulations agreed upon were unlawful restraints of trade. Boycotting booking agents and caterers who occasionally did business with employers not living by the union's rules unreasonably restrained trade. So also did combining with willing caterers and booking agents to impose uniform business practices on bandleaders and to boycott those who did not abide by the established rules and policies. Agreeing with employers that the employers would not take their wares to other cities without charging prices 10% higher than the local employers charged was a blatant violation of the Sherman Act. Horizontal division of territories has always been held a *per se* violation of § 1, *e. g.*, *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211 (1899), and it should make no difference that the instigation for this division came from the union and not from the employers. I am unable to see how the practice at issue here is distinguishable from an agreement by General Motors and Ford, at the behest

<sup>9</sup> *United States v. Parke, Davis & Co.*, 362 U. S. 29 (1960). See also *Albrecht v. Herald Co.*, 390 U. S. 145, 150, n. 6 (1968). I cannot believe that the Court intends its n. 8 to hold that unilateral demands, enforced by threats, combined with willing cooperation or reluctant acquiescence by leaders (who may join the union and in any event obey its rules), cannot amount to a combination in restraint of trade.

## 8 FEDERATION OF MUSICIANS v. CARROLL.

of the UAW, for GM to sell west of the Mississippi only at prices 10% higher than those charged by Ford, while Ford would sell in the East only at prices higher than GM's. Since union combinations with nonlabor groups which restrain trade are not immune from antitrust attack, *Allen Bradley Co. v. Union*, 325 U. S. 797 (1945); *Mine Workers v. Pennington*, 381 U. S. 657 (1965), I think petitioners should be permitted to show that these unlawful and unimmunized restraints of trade injured them, and should be able to recover the trebled amount of such damages as they can establish.

By combining with a nonlabor group, the musicians union has obtained effective control of the entire club-date industry. The device for this control has been imposition of union membership and union rules on cooperating bandleaders, and on some who did not want to cooperate. I am sure the Clayton and Norris-LaGuardia Acts never intended to give unions this kind of stranglehold on any industry. It may be that the Court views this industry as having special problems of supply and demand requiring special treatment under the antitrust laws. If this is the case, the Court should frankly say so and seek to confine the misguided rules of law it announces. More appropriately, the Court should leave to Congress the task of making special provisions in the antitrust laws for the special circumstances of the music industry. On more than one occasion Congress has seen to it that the full rigors of the antitrust laws are not felt by industries which cannot survive under competitive conditions.<sup>10</sup> The Court treads dangerous

---

<sup>10</sup> *E. g.*, Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. § 291 (agricultural cooperatives); Webb Act, 40 Stat. 517, 15 U. S. C. § 62 (foreign trade associations); Act of Nov. 8, 1966, 80 Stat. 1515, 15 U. S. C. § 1291 (Supp. II 1967) (joint agreements by professional football clubs).

FEDERATION OF MUSICIANS v. CARROLL. 9

ground in seeking on its own motion to deny to a particular industry the normal competitive conditions envisioned by the antitrust laws, conditions usually viewed as essential for maintaining service and prices at satisfactory levels.